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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

LANDGATE, INC.,

Petitioner,

v.

CALIFORNIA COASTAL COMMISSION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE CALIFORNIA SUPREME COURT

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

IN THE SUPREME COURT OF CALIFORNIA

FILED: Apr 30, 1998
SUPREME COURT
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LANDGATE, INC., et al., Plaintiffs and Appellants, v. CALIFORNIA COASTAL COMMISSION, Defendant and Appellant.	S059847 Ct. App. 2/1 B084315 L.A. County Super. Ct. No. BC 024391

In *First Lutheran Church v. Los Angeles County* (1987) 482 U.S. 304, 321,[1] the court held that "where the government's activities have already worked a taking of all use

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1/ The full name of this case is *First English Lutheran Church of Glendale v. County of Los Angeles*. We will hereinafter follow the common practice of referring to the case as *First English*.

= SEE DISSENTING OPINIONS =

of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which a taking was effective." In so holding, the court cautioned that the holding did not extend to "the quite different questions that would arise in the case of normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like which are not before us." (*Ibid.*) In the present case, we consider whether a delay in the issuance of a development permit partly owing to the mistaken assertion of jurisdiction by a government agency is a type of "temporary taking" contemplated in *First English*, or if it is more in the nature of a "normal delay" that does not constitute a taking. The Court of Appeal held that a temporary taking had indeed occurred. We conclude that the present case falls squarely into the category of a normal delay rather than a temporary taking, and therefore reverse the Court of Appeal.

I.

Because of the complexities of this case, a somewhat detailed recitation of the facts is in order. The case centers on the efforts of plaintiff Landgate[2] to build a large home in the Malibu Hills. Landgate's predecessor in interest owned two long, thin parcels or "lots" oriented in a north-south direction. The northern portions were sloped, the southern portions flat. One of the lots contained a single family home on the southern portion. The coast lay to the south of these lots.

In the mid-1980's, the County of Los Angeles (the County) planned to provide an east-west road that would run through the two lots. The landowner and the County agreed that, in

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2/ According to Landgate's first amended complaint, Peter and Punte Bogart "owned and controlled" Landgate, and held a life estate in the subject property.

exchange for the owner's dedicating portions of the parcels for the roadway easement, the County would reconfigure the lots into a single, sloped 2.45-acre lot north of the road and a single, flat 1.56-acre lot south of the road, each still zoned for a single family home. The County completed the road improvement, designated as De Butts Terrace, and formally approved a lot re-configuration, which was recorded July 5, 1989.

The lots in question are and at all relevant times were in the coastal zone (Pub. Resources Code, §30103) and therefore subject to the development restrictions imposed by the California Coastal Act of 1976 (Coastal Act), Public Resources Code section 30000 et seq. The act requires local governments within the coastal zone to prepare Local Coastal Programs (LCP) containing a Land Use Plan (LUP) and a set of implementing ordinances designed to promote the act's objectives of protecting the coastline and its resources and maximizing public access. (Pub. Resources Code, §§ 30001.5, 30512, 30513.) In general, the act provides that, until a certified LCP is approved by the Coastal Commission (Commission), authority to approve development lies with the Commission. (*Id.*, § 30519.) At the time the pertinent events took place, the Commission had approved the County's LUP for Malibu but had not yet approved the LCP. Therefore, the Commission retained jurisdiction over the issuance of coastal development permits for the area in which the subject property is located.

In October 1990, Landgate bought the sloped northern lot and received County approval in concept for grading and building plans for a single-family home to be built on the property. Landgate applied to the Commission for permits to build the house and related structures. Landgate's permit application sought approval of a 9,036-square-foot home and

guest house, a swimming pool and septic tank and 8,500 cubic yards of grading. As originally proposed, the house was 44 feet above existing grade. Before the Commission's initial consideration of the development, Landgate modified its proposal by reducing the house to 7,500 square feet, eliminating the guest house and reducing the proposed grading to 4,300 cubic yards.

At its December 1990 and February 1991 meetings, the Commission was presented with staff reports objecting to several aspects of the project. First, staff was concerned with visual impacts of the house, since it was located next to Escondido Canyon, "a highly scenic area which includes a hiking trail to Escondido Falls. The proposed project is located south and west of Escondido Canyon and is visible from the Escondido Falls Trail and the Escondido Falls." The preservation of scenic and recreational resources of the coastal area is encouraged by both the Coastal Act and the Malibu LUP. (See Pub. Resources Code, § 30251.) Staff concluded that the visual impact of Landgate's proposed development would be significant both because of its location on the lower, northern lot closer to the trail and falls, and because of the 44-foot height, 9 feet above the allowable height contained in the Malibu LUP.

Second, staff found the amount of grading required of the proposed project to be objectionable. "In essence, the applicant is creating a large level pad area on a hillside lot, instead of designing the house to conform with the natural topography." The grading plan was contrary to the Malibu LUP, which called for the minimization of grading for all new development "to ensure the potential negative effects of runoff and erosion on [visual] resources are minimized." Staff found that these problems would be alleviated if the house was built on the southern side of De Butts Terrace.

These concerns and objections were inextricably linked to staff's third concern, that the Commission had not approved the lot line adjustment obtained from the County by Landgate's predecessor in interest. As noted, prior to the approval of the lot line adjustment, the length of the lots ran in a north to south direction standing side-by-side east to west. If the old lots had remained, then development could have been directed to the more topographically and visually suitable southern portion of the property. Staff further concluded that the lot line adjustment had been illegal. It reached its conclusion as follows: It first observed that section 30106 of the Public Resources Code contains a broad definition of "development" for which a coastal development permit is necessary. " 'Development' means, on land, in or under water, the placement or direction of any solid material or structure; discharge or disposal of any drenched material or any gaseous, liquid, solid, or thermal waste; grading, removing, dredging, mining, or extraction of any materials; change in the density or intensity of use of land, including, but not limited to, *subdivision pursuant to the Subdivision Map Act . . . and any other division of land, including lot splits,* except where the land division is brought about in connection with the purchase of such land by a public agency for public recreational use . . . ." (*Ibid.*, italics added.) Staff then cited a 1986 memorandum from the Attorney General circulated to the Commission concluding that "[a] lot line adjustment is a form of a lot split. In some instances, a lot line adjustment may be so minor as to warrant the Commission finding that it is de minimis and qualifies for a waiver pursuant to section 30624.7. In other instances a lot line adjustment may be such that it does bring about a major change in the density or intensity of use of land. In such a case it would fall within the definition of development in section 30106, and would necessarily require a coastal development permit."

The staff report then considered whether the lot line adjustment in question "involves a major change in the density or intensity of land-use." It concluded that while a lot line adjustment did not alter the density of development it would alter its intensity: "The topography north of De Butts Terrace is relatively steep and not suited to development. This proposed project would change the intensity of land-use in this area by allowing development of the north side of the road. . . . Staff believes that the least environmentally damaging site for development is on the coastal [i.e. southern] side of De Butts Terrace and that the original lot configuration of long thin parcels extending across the road should not be altered."

The Commission considered the various issues raised by staff at its December 13, 1990, meeting and voted to continue the matter because of questions concerning the legality of the lot line adjustment. According to the declaration of Landgate's engineer/representative in support of its motion (Petrovsky Declaration), "once the lot line adjustment issue was raised . . . staff would not negotiate with regard to issues of the size of home, grading, etc. Instead, the legality of the lot became the focus of their attention." Landgate reapplied for a coastal development permit proposing the same project as described above, but adding a request for Commission approval of the County lot line adjustment.

At its February 1991 meeting the Commission denied Landgate's application. It adopted staff findings that the proposed house and related structures would produce excessive soil, grading, and visual degradation.[3] Immediately

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3/ According to Commission regulations, a vote by the Commission that is "consistent with [the] staff recommendation and not otherwise modified, . . . shall be deemed to adopt the findings and conclusions

(continued...)

after the vote, Commissioner Glickfeld commented on Los Angeles County's perceived unwillingness to comply with the Coastal Act: "I really regret the situation that this applicant has been put in because of Los Angeles County's refusal to comply with the Coastal Act and I hope that . . . our staff counsel could be directed to communicate that very clearly with Los Angeles County, bring their response back to us and pursue, if necessary, litigation to insist that the County of Los Angeles comply with the law in this matter." The chief counsel stated that he would prepare a letter to the County.

In March 1991, Landgate filed a petition for writ of mandate against the Commission asserting that the Commission had no jurisdiction over the lot line adjustment. The petition was conjoined with a complaint asserting a taking of property without just compensation and a denial of civil rights, seeking damages and declaratory relief. The mandate petition and takings complaint were severed, with the latter reserved for later adjudication.

Meanwhile, in April 1991, the Commission heard Landgate's request for reconsideration of its project. Grounds for reconsideration of an application exist when "there is relevant new evidence which, in the exercise of reasonable diligence, could not have been presented at the hearing . . . or that an error of fact or law has occurred which has the potential of altering the initial decision." (Pub. Resources Code, § 30627, subd. (b)(3).) At that meeting, Landgate's representative presented a new version of the proposed

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3/ (...continued)
recommended by the staff." (Cal. Code Regs., tit. 14, § 13092, subd. (d).) Thus, the Commission, in denying the application consistent with the staff report, is deemed to have adopted the staff's proposed findings discussed above.

residence that would be only 32 feet above the existing natural grade, would have 1,000 cubic yards of grading, and would make other changes in order to conform the appearance of the house to its natural surroundings. Commission staff opined that the new proposal was more appropriately presented to the Commission as a new project, but did not constitute "new evidence" or "error of fact or law" that would be grounds for reconsidering its February 1991 denial of the project. Staff also told the Commission that "part of the basis for your denial [of the project] was a lot line adjustment and . . . we told them even if they make these modifications we'll still recommend denial." The Commission's legal counsel told the Commission: "Without a lot line adjustment some of these revisions are I think irrelevant." He also stated: "This project does not work, if you please, without that lot line adjustment." He further stated that, in light of the action that Landgate had filed before the request for reconsideration contesting the Commission's jurisdiction over the lot line adjustment, "my advice would be to continue to maintain the position you have maintained before and allow the court system to determine the dispute that presently exists between the Commission and [Landgate] with regard to that." The Commission voted to deny reconsideration.

The above mentioned litigation proceeded and in October 1991 the trial court granted Landgate's petition for writ of mandate. Specifically, the trial court set aside the Commission's action of February 1991 denying Landgate's application and ordered the Commission to reconsider the application. The court found that, in view of the factual circumstances in this case, the definition of "development" as found in Public Resources Code section 30106 "does not include the lot line adjustment approved and recorded by the County of Los Angeles in 1989 with regard to the subject property. Therefore, upon remand to the Commission, the

Commission must consider [Landgate's] application without any reference or consideration of a lot line adjustment. The Commission is to consider the subject property to be a legal lot." The court did not order the approval of any particular development proposal.

The Court of Appeal affirmed the trial court in an unpublished decision in December 1992. In arriving at its conclusion, the court found significant the fact that Landgate had purchased a lot that had been approved by the County and had been recorded, that the Commission had approved the construction of the road, De Butts Terrace, that made the then-existing lot configuration impractical and necessitated the lot line adjustment, and that the Commission's position with respect to the lot line adjustment would render Landgate's property valueless. In essence, it held that Public Resources Code section 30106 did not authorize the Commission to invalidate a legally recorded lot line adjustment to which the Commission, by its actions and inaction, had given tacit approval, when an innocent purchaser would stand to lose all value from its lot from such invalidation. The court also questioned the Commission's assertion that any building on Landgate's lot was inconsistent with the Coastal Act, citing other development north of De Butts Terrace that the Commission had approved. In its conclusion, it emphasized that the Commission "retained its ability to regulate and approve any proposed building on the lot."

In February 1993, the Commission again considered Landgate's project, which had been modified by reducing grading to 2,893 cubic square yards, by reducing height to 35 feet above existing grade, and by reducing the fill slope, among other changes. It required further changes in the project to address the visual impacts and erosion problems that it had earlier found to be objectionable. Specifically, it imposed a

height limitation of 28 feet above existing grade on the proposed residence, required a drainage plan as well as color restrictions and landscape requirements consistent with the scenic preservation with which the Commission was concerned. Landgate did not challenge these conditions.

Subsequently, Landgate moved for summary adjudication of its still-unresolved takings claim. It contended that the Commission's erroneous assertion of permit jurisdiction over the lot line adjustment prevented it from making any economically viable use of its property for the period prior to the Commission's approval of its project in February 1993. The Commission moved for summary judgment, contending that its jurisdictional error did not constitute a taking of Landgate's property. The trial court granted Landgate's motion, ruling that the Commission had temporarily taken Landgate's property from February 1991 to February 1993. In its statement of decision, the trial court declared that "Landgate's third cause of action for taking of property without just compensation . . . is meritorious as a matter of law . . . because Landgate has been deprived, at least temporarily, of all economically viable or productive use of its property insofar as Landgate, at least temporarily, could not legally obtain any valid permits for approvals to construct any project on its property as a result of the Commission's actions." The trial court also denied the Commission's motion for summary judgment. After a bench trial on the issue of damages, the trial court awarded takings damages of $155,657 for the period between February 1991 and February 1993. The Commission appealed the grant of summary adjudication and the award of attorney fees. Landgate filed an appeal contesting the amount of damages and filed a separate notice of appeal from the trial court's award of costs and attorneys fees.

The Court of Appeal affirmed the trial court's grant of summary adjudication in Landgate's favor. It appeared to accept the Commission's assertion that reasonable mistakes made by a government agency in the development approval process do not necessarily constitute takings. But, as it stated: "[W]hat we cannot accept is the Commission's characterization of the treatment of Landgate here as the reasonable result of a 'mistake.' Nothing in the record suggests that the lot line adjustment issue arose out of anything other than the Commission's ongoing jurisdictional spat with the County of Los Angeles combined with a desire to prevent Landgate from building on its parcel. Instead, the overwhelming sense of the record is that by its insistence that the lot itself was illegal, the Commission put Landgate in a situation which was not of its own making and which Landgate could do nothing to cure. In short, this is not a case of bureaucratic bungling, but the declaration of war between governmental behemoths in which the inevitable casualty was to be a noncombatant, Landgate." It also affirmed the trial court's award of damages. We granted review to address the important question of whether the Commission's apparently mistaken assertion of jurisdiction of the lot line adjustment in this case led to a temporary taking of Landgate's property.[4]

4/ We note at the outset that this case comes to us after a grant of Landgate's summary adjudication motion on its claim that its property was taken without just compensation and a denial of the Commission's motion for summary judgment. Thus, we undertake independent review of the record to determine whether a triable issue of fact exists as to the takings claim. (*Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 973, fn. 7.)

II.

A.

Before addressing the present issue, we briefly summarize pertinent takings jurisprudence. In determining whether a government regulation works a taking of property under the Fifth Amendment to the United States Constitution, the United States Supreme Court has generally eschewed any "set formula" for determining how far is too far, preferring to engage in " 'essentially ad hoc, factual inquiries.' " (*Lucas v. South Carolina Coastal Council* (1992) 505 U.S. 1003, 1015 (*Lucas*).) The court has stated that the "economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations." (*Penn Central Transp. Co. v. New York City* (1978) 438 U.S. 104, 124.) The court has also stated that "the Fifth Amendment is violated when land-use regulation 'does not substantially advance legitimate state interests.' " (*Lucas, supra*, 505 U.S. at p. 1016.) The court has furthermore described "at least two discrete categories of regulatory action as compensable without case-specific inquiry into the public interest advanced in support of the restraint. The first encompasses regulations that compel the property owner to suffer a physical 'invasion' of his property. In general (at least with regard to permanent invasions), no matter how minute the intrusion, and no matter how weighty the public purpose behind it, we have required compensation. . . . [¶] The second situation in which we have found categorical treatment appropriate is where regulation denies all economically beneficial or productive use of land." (*Id.* at p. 1015.)

In *Agins v. City of Tiburon* (1979) 24 Cal.3d 266, 275, we had held that the sole remedy for government regulation that

effects a taking of property is an administrative mandamus overturning the regulation rather than an award of damages. That holding was repudiated by the United States Supreme Court in *First English, supra*, 482 U.S. 304. In *First English*, the plaintiff operated a campground on which lay a number of buildings that had been destroyed by flood. An interim Los Angeles County ordinance prohibited construction or reconstruction of any building or structure in an interim flood protection area that included the plaintiff's land. The court assumed for purposes of the appeal that the ordinance deprived the plaintiff of all economically beneficial use of its property. It then held that such deprivation constituted a temporary taking of the property for which compensation must be paid. " '[T]emporary' takings which . . . deny a landowner all use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation." (*Id.* at p. 318.) Thus, the court held that "where the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective." (*Id.* at p. 321.)

The *First English* court emphasized the narrowness of its holding. "We . . . point out that the allegation of the complaint which we treat as true for purposes of our decision was that the ordinance in question denied appellant all use of its property. We limit our holding to the facts presented, and of course do not deal with the quite different questions that would arise in the case of normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like which are not before us." (*First English, supra*, 482 U.S. at p. 321.)

Consistent with this implied limitation on the temporary takings doctrine, the United States Supreme Court has also

"made it quite clear that the mere assertion of regulatory jurisdiction by a governmental body does not constitute a regulatory taking. [Citation.] The reasons are obvious. The requirement that a person obtain a permit before engaging in a certain use of his or her property does not itself 'take' the property in any sense: after all, the very existence of a permit system implies that permission may be granted, leaving the landowner free to use the property as desired." (*United States v. Riverside Bayview Homes, Inc.* (1985) 474 U.S. 121, 126-127.) Stated in other terms, whereas "the Fifth Amendment's just compensation provision is 'designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole' " (*First English, supra*, 482 U.S. at pp. 318-319, fn. omitted), a rational permit regulation scheme is imposed on the public as a whole to ensure the orderly development of real property, benefiting as well as burdening property owners.

Finally, the Supreme Court has emphasized that the question whether property has been taken is not ripe for decision until a government agency has rendered a final decision on the use to which the property in question may be put. "Our reluctance to examine taking claims until . . . a final decision has been made is compelled by the very nature of the inquiry required by the Just Compensation Clause. Although '[t]he question of what constitutes a "taking" for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty' [citation], this Court consistently has indicated that among the factors of particular significance in the inquiry are the economic impact of the challenged action and the extent to which it interferes with reasonable investment-backed expectations. [Citations.] Those factors simply cannot be evaluated until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question."

(*Williamson Planning Comm'n v. Hamilton Bank* (1985) 473 U.S. 172, 190-191; see also *McDonald, Sommer & Frates v. Yolo County* (1986) 477 U.S. 340, 348.)

B.

The present case poses the issue of whether a legally erroneous decision of a government agency during the development approval process resulting in delay constitutes a temporary taking of property. Virtually every court that has examined the issue has concluded, for various reasons and under various theories, that a regulatory mistake resulting in delay does *not*, by itself, amount to a taking of property. (See *Littoral Development Co. v. San Francisco Bay Conservation etc. Com.* (1994) 33 Cal.App.4th 211, 221-222 (*Littoral Development Co.*); *Del Oro Hills v. City of Oceanside* (1995) 31 Cal.App.4th 1060; 1080; *Jacobi v. City of Miami Beach* (Fla.Dist.Ct.App. 1996) 678 So.2d 1365; 1367; *Cannone v. Noey* (Alaska 1994) 867 P.2d 797; 801; *Dumont v. Town of Wolfeboro* (N.H. 1993) 622 A.2d 1238; 1244; *Tabb Lakes, Ltd. v. U.S.* (Fed. Cir. 1993) 10 F.3d 796; 801-802; *Steinbergh v. City of Cambridge* (Mass. 1992) 604 N.E.2d 1269, 1274-1277; *Smith v. Town of Wolfeboro* (N.H. 1992) 615 A.2d 1252; 1257-1258; *1902 Atlantic Ltd. v. United States* (1992) 26 Ct.Cl. 575; *Lujan Home Builders v. Orangetown* (1991) 568 N.Y.2d 850, 851.)

In *Steinbergh v. City of Cambridge*, *supra*, 604 N.E.2d 1269 (*Steinbergh*), for example, the Supreme Judicial Court of Massachusetts considered the claim of a landlord suing the city for takings damages stemming from a city regulation that restricted the conversion of rental units into condominiums. The court had, in a previous decision, declared that the regulation exceeded the city's statutory authority under the state's rent control statute and was therefore invalid. The

plaintiff claimed that he suffered damages from the decline in the condominium market during the period of the delay that resulted from the necessity of mounting a legal challenge to the invalid rent regulation. The court first concluded that the regulation in question was neither a physical invasion of property nor a deprivation of all viable use, nor a substantial interference with the property owner's distinct investment-based expectations. (See *id.* at p. 1274.) The court likened the delay experienced in the case to delay "that commonly occurs in seeking regulatory approvals for changes in local ordinances and by-laws, which are government-imposed processes that have not traditionally been viewed as constituting regulatory takings." (*Id.* at p. 1275.) "It is, of course, true that in this case the delay was caused, not by the necessity of obtaining mandated governmental approvals, but by the process of presenting a judicial challenge to a municipal regulation. That legal challenge resulted in invalidation of the regulation as beyond the authority of the city to adopt, but not because the municipal regulation was unconstitutional as violating rights to due process or equal protection of the laws. The plaintiffs make no reasoned argument that, simply because a municipal regulation is not authorized by law, there is a compensable temporary taking of property, even though the regulation restricts the sale and reduces the market value of the property until the regulation is successfully challenged in court." (*Ibid.*)

The *Steinbergh* court then considered the argument that the invalidated regulation did not " 'substantially advance legitimate state interests' " and therefore was a taking of property under the test articulated by the Supreme Court. (*Steinbergh, supra*, 604 N.E.2d at p. 1275, quoting *Agins v. Tiburon* (1980) 447 U.S. 255, 260.) Although it had found in its previous decision that the condominium conversion regulation was insufficiently connected with rent control, and

therefore not impliedly authorized by the state rent control statute, it rejected the argument that this state law defect translated into a constitutional flaw. It found that the regulation was "a 'logical and sufficiently well-founded approach to dealing' with a problem [of removal of rental units from the market] for us to find . . . that the 'essential nexus' between the state's interest and its chosen means is present in this case." (*Steinbergh*, *supra*, 604 N.E.2d at p. 1277.) Therefore, despite the invalidity of the regulation, it concluded that the plaintiffs had not met their constitutional burden of demonstrating that the regulation failed to substantially advance a legitimate state interest.

Our own Court of Appeal has reached a similar conclusion. (See *Del Oro Hills v. City of Oceanside*, *supra*, 31 Cal.App.4th 1060, 1080; *Littoral Development Co.*, *supra*, 33 Cal.App.4th 211.) In *Littoral Development Co.*, the Court of Appeal considered a regulatory taking claim against the San Francisco Bay Conservation and Development Commission (BCDC). It had decided in a previous decision that BCDC, which was given jurisdiction over development of property adjacent to San Francisco Bay subject to "tidal action" (Gov. Code, § 66610, subd. (a)), had incorrectly asserted jurisdiction over the landward two-thirds of the plaintiff's property in Marin County, thereby delaying the construction of a hotel on that property. It had accordingly reversed the trial court's decision upholding that jurisdiction. Nonetheless, it rejected the takings claim, stating: "Under the circumstances, we cannot find any regulatory 'taking' of any property, merely because delay resulted from factual or legal uncertainties which temporarily clouded the respective limits of BCDC's and Marin County's regulatory jurisdiction. . . . [¶] While we recognize that, on very different facts, a transient and impermanent interference in real property use due to egregious bureaucratic overreaching may arguably constitute a compensable

temporary taking, BCDC's actions here were facially valid and supported by a plausible though erroneous legal argument which the trial court accepted. We decline to hold that such a taking occurred here or occurs every time a land-use agency makes an erroneous decision which is ultimately overturned in part on appeal." (*Littoral Development Co.*, *supra*, 33 Cal.App.4th at pp. 221-222.) It also found significant that the plaintiff still had some unspecified use of the property during the pendency of legal proceedings. (*Ibid.*)

We substantially agree with the Supreme Judicial Court of Massachusetts, with our Court of Appeal, and with the other courts cited above that an error by a governmental agency in the development approval process does not necessarily amount to a taking even if the error in some way diminishes the value of the subject property, any more than the commission of state law error during a criminal trial is an automatic violation of the due process clause. (See, e.g., *Estelle v. Maguire* (1991) 502 U.S. 62, 71-73; *People v. Carpenter* (1997) 15 Cal.4th 312, 393.) If the error is of a particular constitutional type -- the passage and enforcement of a law or regulation that deprives property of all value -- then the teaching of *First English* is that such an error is a compensable taking. But government land use regulations and decisions such as those cited above in *Steinbergh* and *Littoral Development Co.*, which, despite their ultimately determined statutory defects, are part of a reasonable regulatory process designed to advance legitimate government interests, are not takings of property under the Supreme Court's doctrine reviewed above. (See *Agins v. Tiburon*, *supra*, 447 U.S. at p. 260.)

An analogous situation may be found when the government initiates condemnation proceedings against an undeveloped tract of land, thereby bringing the development process to a standstill. We have held that when a government agency later

abandoned such proceedings, it was not liable under the takings clause, even when the proceedings caused substantial delay in the development approval process and led to losses in the property's value. (*Agins v. City of Tiburon, supra*, 24 Cal.3d at pp. 271, 277-278 [eminent domain proceeding active for almost one year before abandonment].) The United States Supreme Court affirmed this aspect of our *Agins* decision, agreeing that we had "correctly rejected the contention that the municipality's good-faith planning activities, which did not result in successful prosecution of an eminent domain claim, so burdened the appellants' enjoyment of their property as to constitute a taking. [Citation.] Even if the appellants' ability to sell their property was limited during pendency of the condemnation proceeding, the appellants were free to sell or develop their property *when the proceedings ended.* Mere fluctuations in value during the process of governmental decisionmaking, absent extraordinary delay, are 'incidents of ownership. They cannot be considered as a 'taking' in the constitutional sense.' " (*Agins v. Tiburon, supra*, 447 U.S. at p. 263, fn. 9, italics added.) Just as an aborted condemnation proceeding that delays development is an incident of ownership and not a taking, so the mistaken assertion of jurisdiction over a development is part of the development approval process, and development delays that result therefrom may be imposed on the developer rather than the general taxpayer without violating the United States Constitution.[5]

5/ The principle that a government agency will not be liable in damages for state law errors committed in the development approval process is congruent with Government Code section 818.4, which provides that a public entity cannot be held liable "for an injury caused by the issuance, denial, suspension or revocation of, or by the failure or refusal to issue, deny, suspend or revoke, any permit, license, certificate, approval, order, or similar authorization where the public

(continued...)

The Court of Appeal did not hold that all governmental mistakes in the land use process amounted to takings. The Court of Appeal held rather, as noted above, that the Commission's February 1991 decision to deny Landgate's development application and its position on the lot line issue was not the "reasonable result of a 'mistake' " but rather arose out of a "jurisdictional spat with the County of Los Angeles combined with a desire to prevent Landgate from building on its parcel," and a "declaration of war between governmental behemoths in which the inevitable casualty was to be a noncombatant, Landgate."

The Court of Appeal erred in its attempt to divine, through the statements of Commissioners and commission staff and through circumstantial evidence, the "true," illegitimate, motive for the Commission's decision to deny Landgate's development permit. The proper inquiry is not into the subjective motive of the government agency, but whether there is, objectively, sufficient connection between the land use regulation in question and a legitimate governmental purpose so that the latter may be said to substantially advance the former. (See *Nollan v. California Coastal Comm'n* (1987) 483 U.S. 825, 836-837 (*Nollan*); *Dolan v. City of Tigard* (1994) 512 U.S. 374, 391 (*Dolan*).) This type of objective inquiry is consistent with the principle that courts do not delve into the individual purposes of decision-makers in a quasi-adjudicative proceeding, but rather look to the findings made by the government agency and determine whether these are based on substantial evidence. (*City of Fairfield v. Superior Court* (1975) 14 Cal.3d 768, 779; *Topanga Assn. for a Scenic*

5/ (...continued)
entity or an employee of the public entity is authorized by enactment to determine whether or not such authorization should be issued, denied, suspended or revoked."

Community v. County of Los Angeles (1974) 11 Cal.3d 506, 515-516; see also *United States v. Morgan* (1941) 313 U.S. 409, 422.) Thus, we must determine not whether a sinister purpose lurked behind the Commission's decision, but rather whether the development restrictions imposed on the subject property substantially advanced some legitimate state purposes so as to justify the denial of the development permit.

Moreover, the cases suggest that judicial review of governmental conditions imposed upon development will be more deferential when the conditions are simply restrictions on land use and not requirements that the property owner convey a portion of his property (see *Nollan, supra*, 483 U.S. at p. 841; *Dolan, supra*, 512 U.S. at pp. 388-391) or pay development fees imposed on a property owner on an individual and discretionary basis (*Ehrlich v. City of Culver City* (1996) 12 Cal.4th 854, 876). In the present case, neither conveyances nor individualized development fees are at issue.

The Commission's denial of Landgate's permit in February 1991 did indeed appear to substantially advance legitimate governmental interests and to be supported by substantial evidence. The Commission's findings articulated three objections to the project as proposed. First, the Commission was concerned that the large house, 44 feet above natural grade and 9 feet above the maximum allowable height set forth in the Malibu LUP, would be unsightly when viewed from Escondido Trail and Escondido Falls. Second, the Commission was concerned that excessive grading on the north slope, where the house was to be built, was contrary to the Malibu LUP, which called for the minimization of grading for all new development "to ensure the potential negative effects of runoff and erosion on [visual] resources are minimized." These are unquestionably legitimate government purposes (see *Ehrlich v. City of Culver City, supra*, 12 Cal.4th

at p. 886 [promotion of scenic and aesthetic objectives within the scope of the police power]) and there is substantial evidence in the record in support of the reasonableness of the Commission's position. Indeed, Landgate does not challenge the conditions ultimately imposed by the Commission requiring the reduction of building height and total amount of grading.

The third Commission objection, the improper lot line adjustment, was principally based not on formal, jurisdictional or bureaucratic grounds, but on the view that such adjustment would lead to an intensification of the environmental impacts with which the Commission was concerned. Based on our review of the record, as discussed above, the Commission's position appears reasonable and supported by substantial evidence. It found that the placement of the house on the north slope would make it more unsightly, bringing it closer to Escondido Trail and Escondido Falls, and would also obviously increase the need for grading -- and with it the potential for erosion -- in order to create a flat pad for the proposed residence on a sloping surface. The Commission's preference for construction on the flat south side of De Butts Terrace was therefore reasonable. In sum, the denial of a development permit in February 1991 on the three enumerated grounds advanced legitimate governmental interests in minimizing erosion and unsightly development in the coastal area.

We do not agree with the Court of Appeal that anything in the record establishes that the Commission was motivated in its decisions by a "jurisdictional spat" with Los Angeles County. The Court of Appeal quotes the statement made by one of the commissioners after denial of the application that "the county's refusal to recognize our right to review lot line adjustments" was "an issue that had come before the Commission many times in the Malibu area." She added that it was "really time

to become extremely serious about this" and asked that staff counsel be directed to communicate with the County on the topic. But the fact that the commissioner expressed frustration over the County's failure to recognize the Commission's jurisdiction does not suggest that the primary or even secondary reason for the Commission's vote was to teach Los Angeles County some sort of jurisdictional lesson.

Nor are we persuaded by the Court of Appeal's conclusion that the Commission's decision must not have been based on legitimate environmental concerns because it "could have imposed special conditions on matters such as height in February 1991, but failed to issue the permit until after the lot line question was resolved in February 1993." From the Commission's point of view, the environmental impacts of the project could have been reduced if the original lot line configuration was maintained. Once the Commission was confronted by a court ruling that made restoration of the original configuration impossible, it settled for what it regarded as the next best alternative: permitting development on the north side of De Butts Terrace, but with conditions imposed to reduce these environmental impacts. There is therefore no inconsistency between the Commission's environmental concerns and the respective positions it adopted throughout the development approval process.

The Court of Appeal also concluded that since the Commission may have approved or was going to approve two homes on the same sloping north side as Landgate's parcel, "those approvals are clear indications that but for the lot line adjustment, Landgate's application to build a house and related structures on its property could and would, through the normal negotiation process, have been approved by February 1991 or shortly thereafter." But it is clear that the Commission had a policy to concentrate development in the area on the flat south

side of De Butts Terrace. The fact that there may have been exceptions to this policy, based on considerations particular to these specific projects, for reasons not present in the current administrative record and about which we can only speculate, does not negate the fact that the Commission had a rational policy preference for concentrating development on the south side of De Butts Terrace.

It would be, of course, a different question if, even though the Commission's position on the lot line adjustment substantially advanced a legitimate state interest, that position was so unreasonable from a legal standpoint as to lead to the conclusion that it was taken for no purpose other than to delay the development project before it. Such a delaying tactic would not advance any valid government objective. Here, however, as discussed, the Commission's position on the lot line adjustment issue was based on a construction of Public Resources Code section 30106 and the meaning of the term "development" contained therein that was not unreasonable. As discussed, that section defines development over which the Commission will have jurisdiction broadly to include "change in the density or intensity of use of land, including, but not limited to, . . . lot splits." Without deciding questions not before us,[6] the Commission's conclusion, following the Attorney General's advice, that section 30106 gave it authority to deny the lot line adjustment was "supported by a plausible though [perhaps] erroneous legal argument" and therefore not the basis of a taking. (*Littoral Development Co.*, *supra*, 33 Cal.App.4th at p. 221.)

6/ The Court of Appeal's prior, unpublished decision regarding the lot line issue is now final and may not be relitigated. (See *Kavanau v. City of Santa Monica* (1997) 16 Cal.4th 761, 779.) We do not necessarily endorse that decision, nor are we bound by its reasoning. (*Id.* at pp. 777-779.)

Indeed, the Court of Appeal's earlier decision on the lot line issue was based not on the Commission's general lack of authority over such issues, or even on the fact that invalidation of the lot line would deprive Landgate of property, but rather on the court's determination that the Commission's earlier course of conduct had constituted a kind of acquiescence to the lot line adjustment. Although the Court of Appeal may have been correct on that point, and the Commission mistaken given the peculiar facts of this case, its position was not so objectively unreasonable as to give rise to the inference that it was adopting that position solely for purposes of delay or some other illegitimate reason.

C.

Landgate's argument that the Commission temporarily took its property rests on somewhat different grounds than those on which the Court of Appeal holding was based. Landgate argues that regardless of whether the Commission's lot line adjustment condition substantially advanced a legitimate state interest, the imposition of such condition was nonetheless a taking because it temporarily deprived Landgate's property of all value. Landgate contends that from the time the development permit was denied in February 1991 until the time it was approved in February 1993 after the lot line issue had been resolved by litigation, the development process was at a standstill, effectively depriving the property of all economic benefit. Landgate cites the Petrovsky Declaration, discussed above, as evidence that the Commission refused to continue negotiation with Landgate as long as the jurisdictional dispute over the lot line adjustment was pending. Landgate argues that the Commission's actions amount to a denial of all economically beneficial use of the land and thus is a categorical taking (*Lucas*, *supra*, 505 U.S. at p. 1016) even if only temporary. (*First English*, *supra*, 482 U.S. at p. 320.)

Of course, each time there is a delay in the development process, the delay may be said to temporarily deprive the developer of undeveloped property of use of that property. From the would-be developer's point of view, the impact of ordinary delay due to a governmental mistake on the one hand, and denial of all feasible use on the other, may be identical. But as discussed above, for purposes of the takings doctrine the two types of governmental action are quite different. (See *First English, supra*, 482 U.S. at p. 321.)

Landgate asserts, however, that what is at issue in this case was not a normal development delay due to the Commission's mistake, but in fact a final Commission decision to ban all development of Landgate's property, a position the Commission was forced to abandon only because it lost on the jurisdictional question. More specifically, Landgate contends the Commission's position that the former lot lines be preserved, combined with its insistence that no development take place north of De Butts Terrace, rendered Landgate's lot valueless, because its lot was situated wholly to the north of De Butts Terrace. To state the argument differently, if, for example, a municipality's ordinance denies a parcel of real property all economically feasible use, it would arguably be no defense to a temporary takings claim to show that the ordinance was eventually invalidated for being inconsistent with the municipality's general plan.[7] Similarly, Landgate

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7/ The Commission and some of its amici curiae argue that a government exercise of power that is beyond its jurisdictional authority can *never* be a taking. The argument is based on the principle that the takings clause only authorizes compensation for "a taking of private property for *public* use," and that when a government's action is ultra vires because the agency has exceeded its statutory authority, it cannot as a matter of law be said to have taken property for public use. Some

(continued...)

contends in effect that its failure to make progress toward developing its property between February 1991 and February 1993 was due not to an interim uncertainty created by the jurisdictional dispute with the Commission, but to a decision by the Commission in February 1991, and subsequently, to deny all economically feasible use of Landgate's property, a denial that was the administrative equivalent of an ordinance banning all development on the subject property, such as was found in *First English*.

In considering whether the Commission's actions constituted in fact a denial of all economically feasible use, we first note that the Supreme Court has characterized the circumstances under which a categorical taking occurs under these circumstances as "extraordinary" and "relatively rare." (*Lucas*, *supra*, 505 U.S. at pp. 1017, 1018.) In *Lucas*, for example, the court was confronted with South Carolina's Beachfront Management Act, which authorized a government agency to establish a coastal zone in which no development could occur, and which "had the direct effect of barring [the property

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7/ (...continued)
federal courts appear to accept this rationale, holding that the Tucker Act (28 U.S.C. § 1491), creating a statutory procedure by which those who have had their property taken by the United States Government may file a claim for compensation, does not cover " 'an executive taking not authorized by Congress, expressly or by implication.' [Citations.] ('[B]efore a compensable taking can be found by the court, there must be some congressional authorization, expressed or implied, for the particular taking claimed.') Thus, claimant must concede the validity of the government action which is the basis of the takings claim to bring suit under the Tucker Act. . . ." (*Tabb Lakes, Ltd. v. U.S.*, *supra*, 10 F.3d at p. 802-803.) Because we decide the issue on other grounds, we do not decide the question whether the action of a government agency that exceeds its statutory authority can ever be a compensable taking.

owner] from erecting any permanent habitable structures on his two parcels." (*Id.* at p. 1007.) The property owner bears the burden of showing that the government action in question denied it economically beneficial use of its land. (*Id.* at p. 1016, fn. 6.)[8]

Landgate ignores the critical difference between this case and *Lucas* and *First English*. An understanding of this difference begins with the principle that "the mere assertion of regulatory jurisdiction by a governmental body does not constitute a regulatory taking." (*United States v. Riverside Bay Homes, Inc.*, *supra*, 474 U.S. at p. 126.) Part of that regulatory process is the imposition of certain procedural conditions and substantive requirements on development. These conditions can include such matters as the filing of a proper subdivision map (Gov. Code, § 66426), installation of proper sewer facilities, (*id.*, § 66483), or the requirement that the development undergo the process mandated by the California Environmental Quality Act (CEQA) (Pub. Resources Code, § 21000 et seq.). A necessary corollary of the above quoted principle is that a government agency may deny a development permit when the reasonable conditions imposed on development are not met without that denial constituting a taking. As the United States Supreme Court has stated, an essential prerequisite to the assertion of a takings claim is "a final and authoritative determination of the type and intensity of development legally permitted on the subject property." (*McDonald, Sommer & Frates v. Yolo County*, *supra*, 477 U.S. at p. 348.) If a would-be developer fails to meet legitimate conditions for obtaining a development permit,

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8/ We also note that in *First English* on remand, the Court of Appeal held that no taking of property had resulted because the owner was still permitted significant use. (*First English Evangelical Lutheran Church v. County of Los Angeles* (1989) 210 Cal.App.3d 1353, 1372.)

then a government agency's refusal to issue such a permit would by no means be a "final and authoritative determination of the intensity of development legally permitted on the subject property," but merely a conditional denial. And, as reviewed in the preceding part of this opinion, the imposition of a development condition is not a constitutional violation merely because that condition is subsequently shown to have been erroneously imposed.

In California, one of the conditions of obtaining a permit for development within the coastal zone is the procurement of a coastal permit. The Commission's authority to approve development is concurrent with the authority of local jurisdictions, and thus compliance with the Subdivision Map Act does not excuse compliance with the Coastal Act. (See Pub. Resources Code, § 30106; see also *South Central Coastal Regional Com. v. Charles A. Pratt Construction Co.* (1982) 128 Cal.App.3d 830, 844-846.) This approval requirement extends to "any . . . division of land" that affects the density or intensity of development. (Pub. Resources Code, § 30106.) As discussed, Landgate's development was denied because of the Commission's plausible, though perhaps legally erroneous, position that Landgate or its predecessor failed to comply with one of the conditions of obtaining a coastal development permit by illegally reconfiguring the lot boundaries. Its rejection of Landgate's development was at most conditional -- nothing in the record suggests that the Commission would have denied a development that fell within legally recognized, and environmentally more favorable, boundaries.

The nature of the Commission's actions comes into clearer focus if we alter the facts of this case slightly. Suppose the original owner of two lots that ran lengthwise in a north to south direction, east and west of each other, which we will designate as lots A and B, decided to reconfigure the lots into

two lots running lengthwise east to west, north and south of each other, lots C and D. The owner submitted development plans for lot C, but the Commission denied development because in its view such a lot did not legally exist, and because to recognize such a lot would have certain detrimental environmental consequences. This decision cannot be fairly characterized as a deprivation of all value of lot C, but simply as a refusal to reconfigure lots A and B. Even if it turned out that the Commission had incorrectly asserted its jurisdiction, it would have committed the state law error of improperly refusing to reconfigure lots A and B, not the constitutional one of denying development on lot C. Or to put it another way, the Commission's denial of development on lot C is not a final decision on that development until the dispute over whether lot C legally existed was resolved. Just as the denial of a permit for failing to properly submit to the CEQA process would not be a taking, even if the government's application of CEQA regulations prove to be flawed (see Pub. Resources Code, § 21168.9 [writ of mandate the sole remedy for violations public agency noncompliance with CEQA]), so the denial of development due to a determination, subsequently held to be erroneous, that the development did not conform to the property's legal boundary is not a taking.

The present case differs from the above hypothetical in that "lot C" was sold to a subsequent purchaser rather than kept by the original owner. But it cannot be the case that this subsequent purchase had a constitutional significance, converting the Commission's assertion of its regulatory jurisdiction to approve lot reconfigurations into a taking of property.[9]

9/ We note that the innocent purchaser of an illegal lot is not left without a remedy. There may well be private remedies available. (See, (continued...)

The present case also differs from the hypothetical because a road was built through lots A and B, thereby supporting Landgate's argument that even if the Commission had jurisdiction over a lot line adjustment, it had implicitly waived its right to deny that adjustment by acquiescing to construction of the road. But the existence of the road, while it may have been grounds for finding that the Commission erred in failing to recognize the legal existence of "lot C," did not convert the Commission's state law error into a taking. Again, the Commission could legitimately require that a lot on which development was requested be legal, when, as here, there are legitimate reasons for so requiring. Therefore, when the Commission determined that Landgate's lot was not legal, it could legitimately litigate the lot line question without offending the takings clause. The Commission could not be said to have reached a final and authoritative determination of the development on Landgate's lot until after the dispute about the legality of the lot had been resolved.

Of course, as explained in the preceding part of this opinion, a government agency may not evade the takings clause by fabricating a dispute over the legality of a lot, or by otherwise arbitrarily imposing conditions on development in order to delay or discourage that development. The

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9/ (...continued)
e.g., *Goodspeed v. Associated Almond Growers* (1929) 208 Cal. 121, 122 [sale of a parcel in violation of the Subdivision Map Act may be rescinded].) The innocent purchaser of an illegal lot may also have the options of negotiating with other private landowners to obtain a legal lot, and negotiating with the government agency to develop the property in such a way as to meet the agency's underlying concerns. Because Landgate's lot was ultimately judged to be legal, we do not know, and need not determine, which of these options Landgate could have pursued.

government agency's assertion of authority, whether or not erroneous, must advance some legitimate government purpose. But as discussed above, the Commission's actions in this case met this constitutional prerequisite.

In light of the foregoing, the difference between this case and *First English* becomes clear. Here, there was a postponement of development pending resolution of a threshold issue of the development approval process -- whether the lot was legal -- and not a final decision denying development. In *First English*, on the other hand, the Supreme Court assumed that the ordinance in question categorically denied all property owners within its purview the right to develop their property. Development was assumed to be denied in *First English*, in other words, even though there was no dispute about a threshold issue in the development approval process, as there was in this case, that would be a legitimate basis for postponing approval of development. The postponement of Landgate's development therefore does not constitute a temporary taking of property as that doctrine was conceived in *First English*.

Landgate indeed appears to argue that any impasse in the regulatory process that must be resolved through a judicial proceeding is a temporary taking rather than a normal delay in development. But *First English* merely stands for the proposition that once a government action finally denies all economically viable use of property, the fact that the government later rescinds that action after a judicial proceedings does not relieve it of its duty to pay compensation. (*First English, supra*, 482 U.S. at p. 321.) Nothing in *First English*, however, is inconsistent with the recognition that a judicial determination of the validity of certain *preconditions to development* is a normal part of the development process,

and the fact that a developer must resort to such a determination does not constitute a per se temporary taking.

In fact, a review of our case law reveals numerous instances in which developers have sought a writ of mandate against public agencies over questions regarding lot configuration, compliance with the Subdivision Map Act, compliance with CEQA, and over other threshold questions that must be resolved before it can be determined whether a development should be permitted to proceed. The resolution of these cases often turns on the construction and application of complex statutory schemes and results in significant delays in the development process. In some cases, the developer succeeded in overturning the public agency's decision on these threshold development questions. (See, e.g., *Morehart v. County of Santa Barbara* (1994) 7 Cal.4th 725 [county misconstrues its authority to merge parcels of land under Gov. Code, § 66410 et seq.]; *Lakeview Meadows Ranch v. County of Santa Clara* (1994) 27 Cal.App.4th 593 [county wrongly denies certificate of compliance with Subdivision Map Act pursuant to Gov. Code, § 66499.35 for parcels created prior to 1893]; *Native Sun/Lyon Communities v. City of Escondido* (1993) 15 Cal.App.4th 892, 911 [city misapplies Gov. Code, § 66452.6 in failing to extend subdivision map due to development moratorium]; *San Dieguito Partnership v. City of San Diego* (1992) 7 Cal.App.4th 748 [city misapplies Gov. Code, § 66412 in requiring particular lot line adjustment to comply with Subdivision Map Act]; *Great Western Sav. & Loan Assn. v. City of Los Angeles* (1973) 31 Cal.App.3d 403 [city misconstrues Subdivision Map Act to permit discretion in approving final subdivision map when all the conditions of the tentative map have been met].) In other instances, the courts have upheld the government's position on these threshold development questions. (See, e.g., *Gomes v. County of Mendocino* (1995) 37 Cal.App.4th 977 [county had properly

applied Gov. Code, § 66499.20½ in determining underlying land patents had been eliminated by subsequent subdivision]; *Harroman Co. v. Town of Tiburon* (1991) 235 Cal.App.3d 388 [town's downzoning of plaintiff's property inconsistent with present general plan but consistent with new draft general plan affirmed pursuant to Gov. Code, § 65589.5]); *John Taft Corp. v. Advisory Agency* (1984) 161 Cal.App.3d 749 [county's determination that parcels recognized by a United States Government Survey Map in 1878 not exempted from Subdivision Map Act upheld]; *South Central Coast Regional Com. v. Charles A. Pratt Construction Co., supra*, 128 Cal.App.3d 830 [developer obtaining tentative subdivision map prior to enactment of Coastal Act not exempted from Act's requirements]; *Bel Mar Estates v. California Coastal Com.* (1981) 115 Cal.App.3d 936 [Commission correctly construed statutory authority to deny development]; *Skrogings v. Kovatch* (1976) 64 Cal.App.3d 54 [county properly exercises authority under Subdivision Map Act to deny further lot splits before installation of public sewer system].)

Landgate does not appear to contend that litigation over threshold development questions is a taking of property if the government agency prevails in such litigation. But to conclude that such litigation is a normal part of the regulatory process when the public agency prevails but a per se temporary taking when the public agency loses has no basis in either logic or Supreme Court precedent.

In sum, Landgate has not demonstrated that the development delay between February 1991 and February 1993 was due to anything other than a bona fide dispute over the legality of Landgate's lot and the Commission's jurisdictional authority over the lot line adjustment. Such delay is an incident of property ownership and not a taking of property. (See *Agins v. Tiburon, supra*, 447 U.S. at p. 263, fn. 9.)

Although Landgate was in the unfortunate position of suffering from a delay not of its own making, the same can be said of any governmental mistake or, for that matter, any of a number of possible bottlenecks in the development process. (See, e.g., *Laurel Heights Improvement Assn. v. Regents of University of California* (1993) 6 Cal.4th 1112 [development postponed several years due to association's litigation regarding the adequacy of the environmental impact report]); *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553 [same]; *Friends of La Vina v. County of Los Angeles* (1991) 232 Cal.App.3d 1446 [same].) Because nothing in the record demonstrates that the Commission's actions amounted to a regulatory taking of Landgate's property, the trial court should have granted its motion for summary judgment on Landgate's taking claim, and denied Landgate's motion for summary adjudication.

III.

For all the foregoing reasons, the judgment of the Court of Appeal is reversed and the cause is remanded to the Court of Appeal. The Court of Appeal shall remand to the trial court with directions to grant the Commission's motion for summary judgment against Landgate's takings claim and to deny Landgate's motion for summary adjudication.

MOSK, J.

WE CONCUR: GEORGE, C.J.
KENNARD, J.
WERDEGAR, J.

COPY

LANDGATE, INC. v. CALIFORNIA COASTAL COMMISSION

S059847

DISSENTING OPINION BY CHIN, J.

The takings clause of the federal Constitution guarantees property owners "just compensation" when their property is "taken for public use." (U.S. Const., 5th Amend.) In *First Lutheran Church v. Los Angeles County* (1987) 482 U.S. 304, 322 (*First English*), the United States Supreme Court held that a property owner could recover compensation for a temporary taking.

First English involved a Los Angeles County ordinance that the plaintiff alleged prohibited all use of its property. (*First English*, *supra*, 482 U.S. at p. 308.) The plaintiff asserted that the ordinance constituted a taking of its property for public use, and it sought just compensation. (*Ibid.*) The trial court and California Court of Appeal ruled that plaintiff was not entitled to compensation unless the County opted to retain the ordinance following a judicial determination that the ordinance constituted a taking. (*Id.* at pp. 308-309.) In other words, these courts held that no taking could occur during the period of litigation over the validity of the ordinance. The United States Supreme Court disagreed, holding that, even if the County withdrew the ordinance as a result of the litigation, it still owed compensation for the temporary period the ordinance was in effect. (*Id.* at p. 322.)

Here, the California Coastal Commission (Commission) made clear that it opposed the lot line adjustment that created Landgate's lot, and therefore opposed all development of Landgate's property regardless of the magnitude of the development. The Commission's decision denying Landgate's application for a development permit had the same impact on Landgate as the ordinance in *First English* had on the plaintiff in that case. Landgate sued the Commission and successfully established that the Commission's decision was wrong under state law and also that it constituted a taking. The Commission then approved development of Landgate's property, thereby preventing Landgate from asserting a permanent taking. Under these circumstances, *First English* makes clear that the Commission must pay compensation for the *temporary* taking that occurred while its total ban on development of Landgate's property was in effect.

The majority notes that the high court did not decide in *First English* whether "normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like" would amount to a temporary taking. (*First English*, *supra*, 482 U.S. at p. 321.) The majority argues that this case involves a "normal delay" in the permit approval process, not a temporary taking. (Maj. opn., *ante*, at pp. 2, 31-32.) I disagree. When a regulatory agency prohibits all use of a particular property, and the property owner is forced to sue the agency to get it to change its position, its stonewalling is not fairly characterized as a "normal delay" in the permit approval process. Here, the Commission's denial of Landgate's development permit was not, as the majority argues, "conditional," merely calling for some reasonable act of compliance by Landgate. (Maj. opn., *ante*, at p. 28.) Rather, the Commission made clear that it would not approve any development on Landgate's lot regardless of the circumstances. Nor did the Commission in this case temporarily delay the

permit approval process "pending resolution of a threshold issue." (Maj. opn., *ante*, at p. 31.) Rather, the Commission flatly denied the permit, and its decision was final in every sense. The Commission was not planning to take any further action. Landgate had to sue the Commission to get relief.

In his dissent in *First English*, Justice Stevens articulated the precise argument on which the majority relies here. Specifically, Justice Stevens asserted, as does the majority here (maj. opn., *ante*, at pp. 31-32), that litigation over the validity of a land-use restriction is simply a "normal delay[]" in the permit approval process and therefore cannot give rise to a temporary taking. (*First English*, *supra*, 482 U.S. at p. 334 (dis. opn. of Stevens, J.).) Justice Stevens stated: "The Court's analysis . . . appears to erect an artificial distinction between 'normal delays' and the delays involved in obtaining a court declaration that the regulation constitutes a taking. [¶] *In my opinion, . . . [l]itigation challenging the validity of a land-use restriction gives rise to a delay that is just as 'normal' as an administrative procedure seeking a variance or an approval of a controversial plan.*" (*Id.* at pp. 334-335 (dis. opn. of Stevens, J.), italics added, fns. omitted.) Thus, Justice Stevens would have held that litigation over the validity of a land-use regulation, like other "normal delays" in the permit approval process, cannot give rise to a temporary taking even if the regulation deprives the property owner of all use of its property. The majority of the high court considered Justice Stevens's argument *and rejected it*. Now, the same argument has found new life in the majority opinion here.

I agree with the majority "that a government agency may deny a development permit when the reasonable conditions imposed on development are not met . . . ." (Maj. opn., *ante*, at p. 27.) I also agree that "a judicial determination of the validity of certain *preconditions to development* is a normal

part of the development process, and . . . does not constitute a per se temporary taking." (Maj. opn., *ante*, pp. 31-32, original italics.) Nevertheless, if the "preconditions to development" have the effect of prohibiting all use of the property regardless of the circumstances, then they constitute a taking. If those preconditions are permanent, then the taking is permanent; if those preconditions are temporary, then the taking is temporary. The majority cites numerous cases (maj. opn., *ante*, at pp. 32-33) in which litigation delay was "a normal part of the regulatory process." (Maj. opn., *ante*, at p. 33.) I find these cases irrelevant to the issue before us. First, these cases do not address whether the litigation delay constituted a temporary taking. Second, I do not argue that, in this case, the litigation delay by itself gave rise to the temporary taking; rather, I argue that the Commission's total and final ban on all use of Landgate's property (which existed during the litigation delay) gave rise to the temporary taking. As long as that total ban was in effect, the temporary taking continued.

In *First English*, the court held that "where the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective." (*First English, supra*, 482 U.S. at p. 321.) The majority would limit this holding to cases involving "the passage and enforcement of a *law or regulation* that deprives property of all value." (Maj. opn., *ante*, at p. 17, italics added.) I find no basis in *First English* for this limitation. Here, the policies reflected in the Commission's adjudicative decision, like the ordinance at issue in *First English*, "worked a taking of all use of property," and

nothing "can relieve [the Commission] of the duty to provide compensation for the period during which the taking was effective." (*First English, supra*, 482 U.S. at p. 321.)

Accordingly, I dissent.

CHIN, J.

I CONCUR:

BAXTER, J.

COPY

LANDGATE, INC. v. CALIFORNIA COASTAL COMMISSION

S059847

DISSENTING OPINION BY BROWN, J.

The more things change, the more they remain the same. That is certainly true with respect to this court's takings jurisprudence. Almost 20 years ago, Justice Brennan, dissenting in *San Diego Gas & Electric Co. v. San Diego* (1981) 450 U.S. 621, 636, charged this court with sacrificing the right to just compensation guaranteed by the Fifth Amendment on an altar "of policy judgments made by the . . . judicial branch[]." (*Id.* at p. 661, fn. omitted.) Although the deference commanded by the high court's precedents is not always "absolute," when it has made an attempt to resolve definitively a difficult point of constitutional law that is applicable to the very issue before us, we ought either to respect its judgment or provide a reasoned basis for refusing to do so. To do otherwise, in Charles Fried's words, is "judicial impudence." (Fried, *Impudence* (1992) Sup.Ct.Rev. 155, 157, 192-193.)

I dissent.

Viewing pure democracy as incompatible with personal security or the rights of property (Madison, The Federalist No.

10 (Rossiter ed. 1961) p. 81),[1] the drafters of our Constitution went to extraordinary lengths "to control the governed" and to "oblige [the government] to control itself." (Madison, The Federalist No. 51, *supra*, at p. 322.) By adopting the Constitution, the people of the United States "manifested a determination to shield themselves and their property from the effects of those sudden and strong passions to which men are exposed." (*Fletcher v. Peck* (1810) 10 U.S. (6 Cranch) 87, 138.)

The prohibition of the takings clause is one expression of the constitutional commitment to limiting government and maximizing individual liberty. The protection of private property guaranteed by the Fifth Amendment presupposes the property is sought for legitimate purposes, out of a desire to improve the public condition. It nevertheless prohibits appropriation of property -- even for such beneficial purposes -- without just compensation. The difficulty inherent in trying to reconcile popular self-government with private ownership of property has propelled the Supreme Court's takings doctrine along an erratic course, from protection of property rights as a matter of fixed principle to ad hoc balancing tests and back to categorical rules. The result has been justifiably criticized as muddled.

"[R]ecent cases," according to one scholar, "have done little to clarify the [Takings] Clause, and the doctrine remains in perplexing disarray." (McUsic, *Looking Inside Out: Institutional Analysis and the Problem of Takings* (1998) 92

1/ Had the Federalists lost the argument, our Republic might more closely resemble P.J. O'Rourke's wry description. "The whole idea of our government is this: If enough people get together and act in concert, they can take something and not pay for it." (O'Rourke, Parliament of Whores (1991) p. 232.)

Nw. U.L. Rev. 591, 592, fn. 2 [citing treatises and law review articles over the past 15 years]; Schroeder, *Never Jam To day: On the Impossibility of Takings Jurisprudence* (1996) 84 Geo. L.J. 1531.) Despite the general impossibility of its takings jurisprudence, in *Lucas v. South Carolina Coastal Council* (1992) 505 U.S. 1003 (*Lucas*), the United States Supreme Court made a heroic effort to bring a measure of clarity to an analytical framework that has grown doctrinally more difficult as it has become politically more fundamental. After embracing an intractably complex, ad hoc "balancing test" in *Penn Central Transportation Co. v. New York City* (1978) 438 U.S. 104, 124 (*Penn Central*), the court in *Lucas* enunciated the clear rule which should govern our decision in this case:

"In 70-odd years of succeeding 'regulatory takings' jurisprudence [i.e., following *Penna. Coal Co. v. Mahon* (1922) 260 U.S. 393], we have generally eschewed any ' "set formula " ' for determining how far is too far, preferring to 'engag[e] in . . . ad hoc, factual inquiries.' [Citations.] We have, however, described at least *two discrete categories* of regulatory action as compensable *without case-specific inquiry* into the public interest advanced in support of the restraint. The first encompasses regulations that compel the property owner to suffer a physical 'invasion' of his property . . . . [¶] The second situation in which we have found *categorical* treatment appropriate is where regulation *denies all economically beneficial or productive use* of land. [Citations.]" (*Lucas, supra*, 505 U.S. at p. 1015, italics added.)

If *Lucas* means what it says, it establishes a categorical rule. No amount of judicial legerdemain can transform its objective, bright-line standard into a license for courts to engage in prohibited forms of "case-specific inquiry into the public interests advanced in support of" (*Lucas, supra*, 505 U.S. at p. 1015) a given restraint.

After paying grudging lip service to *Lucas*'s categorical rule, the majority falls back on *Penn Central*'s squishy, "multi-factor" test, a standard so amorphous it is capable of producing virtually any result. This is the very test *Lucas* overruled pro tanto in cases, like this one, where the restraint at issue denies *all* economic use. The torturous logic by which today's majority decides an order of the coastal commission -- one that finally and unqualifiedly denied the landowners here *all* use of their property for over *two years* -- was a mere "temporary delay" is worth examining in detail.

First, the majority resuscitates the *Penn Central* test in this case by ignoring another equally clear precedent. In *First Lutheran Church v. Los Angeles County* (1987) 482 U.S. 304 (*First Lutheran*), the United States Supreme Court concluded that temporary takings are compensable, repudiating this court's contrary holding in *Agins v. City of Tiburon* (1979) 24 Cal.3d 266. The majority dismisses the holding in *First Lutheran* as "narrow[]"; confined to its facts; requiring the existence of a final administrative decision before the presence of a constitutional violation can be determined; a case which did not hold that the "mere" assertion of regulatory jurisdiction constituted a taking; and so on. (Maj. opn., *ante*, at pp. 13-14.) But even if we accept all of the majority's quibbles, both *Lucas* and *First Lutheran* indisputably apply here.

Mystifyingly, the majority then instructs us that "[v]irtually every court that has examined the issue has concluded . . . that a regulatory mistake resulting in delay does *not*, by itself, amount to a taking of property." (Maj. opn., *ante*, at p. 14.) True enough. But none of the 10 cases cited in support of this patently obvious conclusion refutes the plaintiff property owners' claim for just compensation in this case.

Two of these "noncompensable delay" cases preceded *Lucas*; in the remainder, the court found either that the agency had *not* reached a final decision or that the regulation did not deny the owner *all* beneficial use. (See *Littoral Development Co. v. San Francisco Bay Conservation etc. Com.* (1995) 33 Cal.App.4th 211, 221-222 [no final decision]; *Del Oro Hills v. City of Oceanside* (1995) 31 Cal.App.4th 1060, 1065 [no final decision]; *Jacobi v. City of Miami Beach* (Fla.Dist.Ct.App. 1996) 678 So.2d 1365, 1366 [no denial of all economic use]; *Cannone v. Noey* (Alaska 1994) 867 P.2d 797, 801 [same]; *Dumont v. Town of Wolfeboro* (N.H. 1993) 622 A.2d 1238, 1244 [same]; *Tabb Lakes, Ltd. v. U.S.* (Fed. Cir. 1993) 10 F.3d 796, 798 [no final decision]; *Steinbergh v. City of Cambridge* (Mass. 1992) 604 N.E.2d 1269, 1274 [no denial of all economic use]; *Smith v. Town of Wolfeboro* (N.H. 1992) 615 A.2d 1252, 1257-1258 [same]; *1902 Atlantic Ltd. v. United States* (1992) 26 Ct.Cl. 573 [pre-*Lucas* decision applying *Penn Central* analysis]; *Lujan Home Builders v. Orangetown* (1991) 568 N.Y.2d 850, 851 [due process rather than takings analysis].)

Lucas itself teaches that its categorical rules do not apply unless the restraint at issue deprives the property owner of all economic use. (*Lucas, supra*, 505 U.S. at pp. 1015-1019.) Other takings cases make clear the high court's "insistence on knowing the nature and extent of permitted development before adjudicating the constitutionality of the regulations that purport to limit it." (*MacDonald, Sommer & Frates v. Yolo County* (1986) 477 U.S. 340, 351 (*MacDonald*); see also *Williamson County Regional Planning Comm'n v. Hamilton Bank* (1985) 473 U.S. 172, 186 (*Williamson County*) ["Because respondent has not yet obtained a final decision regarding the application of the zoning ordinance and subdivision regulations to its property, nor utilized the procedures Tennessee provides for obtaining just compensa-

tion, respondent's claim is not ripe."].) As the court has stated, however, the role served by the ripeness requirement in the takings context is "prudential": to make clear "the economic impact of the challenged action and the extent to which it interferes with reasonable investment-backed expectations. [Citations.] Those factors simply cannot be evaluated until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question." (*Williamson County, supra*, 473 U.S. at p. 191; see *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.* (1981) 452 U.S. 264 (*Hodel*).)

Only recently, the court underlined the limited contours of "ripeness" in the takings context. In *Suitum v. Tahoe Regional Planning Agency* (1997) _____ U.S. _____ [117 S.Ct. 1659], it said that cases such as *Williamson County*, *MacDonald*, and *Hodel* "addressed the virtual impossibility of determining what development will be permitted on a particular lot of land when its use is subject to the decision of a regulatory body *invested with great discretion, which it has not yet even been asked to exercise*. No such question is presented here." (*Id.* at p. ____ [117 S.Ct. 1667], italics added; see also *Lucas, supra*, 505 U.S. at pp. 1011-1012.) It is that administrative flexibility that lies behind and justifies the prudential ripeness rule in the takings context. Those concerns simply have no bearing in this case, however, where the commission made clear the extent to which it would permit plaintiffs to develop their lot: Not at all. The cases relied on by the majority are thus wide of the only issue presented. Did the commission's definitive refusal to permit plaintiffs to make *any* use of their property -- a refusal that continued until, after two years of litigation, plaintiffs obtained judicial relief -- "den[y] all economically beneficial or productive use of [their] land." (*Lucas, supra*, 505 U.S. at p. 1015.)

This is not a case in which the property owners contend, as the majority would have it, that "a regulatory mistake resulting in delay . . ., by itself, amount[s] to a taking of property." (Cf. maj. opn., *ante*, at p. 14.) That is not, and never has been, the law of takings. Rather, plaintiffs' argument -- and the essential meaning of both *Lucas* and *First Lutheran* -- is that a *final* decision by a regulatory agency that denies *all* economically beneficial use of the property, even temporarily, is a per se compensable Fifth Amendment taking.[2] If that is so, then plaintiffs' property has been "taken," however temporarily, by the commission's order, and the payment of "just" compensation is constitutionally compelled. As both the trial court and the Court of Appeal concluded, that is what happened here.

The majority dodges the otherwise inevitable result by changing the question: "The present case poses the issue of whether a legally erroneous decision of a government agency during the development approval process resulting in delay constitutes a temporary taking of property." (Maj. opn., *ante*, at p. 14.) "Legally erroneous"? "Process"? "Delay"? Of course mere "delay" in a "process" resulting from an "erroneous decision" does not qualify as a constitutional violation. If it did, every "mistake" by government land use

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2/ As *Lucas* itself and following cases have pointed out, there is one recognized exception even to the court's categorical takings rule. If the government can demonstrate that controlling principles of "background law" -- typically embodied in a state's nuisance law -- do not permit the use at issue, compensation is not required. (See 505 U.S. at p. 1029 ["A law or decree with such an effect [i.e., prohibiting all economically beneficial use] must . . . do no more than duplicate the result that could have been achieved in the courts -- by adjacent landowners . . . under the State's law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally. . . ." (Fn. omitted.)].)

authorities leading to any delay in the owner's use of her property would require compensation. A massive raid on the public fisc would ensue. Suppose, however, the question were differently, more evenhandedly, framed as one that "poses the issue of whether a regulatory decision barring any use of property until the agency's decision is overturned by a court constitutes a temporary taking of property?" What result then? That, rather than the majority's tendentious formulation, is the issue presented by this case.

In any event, the majority's trick question has already been asked and answered. As Justice Chin points out in his dissent (see dis. opn. of Chin, J., *ante*, at pp. 2-3), the identical position espoused by the majority -- that litigation over the validity of a land use restriction is simply a "normal delay" in the permit approval process and thus cannot give rise to a temporary taking -- was advanced by Justice Stevens in his *dissenting opinion* in *First Lutheran*. (See 482 U.S. at pp. 334-335.) The precise issue has thus already been considered and rejected by the high court. (See dis. opn. of Chin, J., *ante*, at p. 3.)

If *Lucas* lays down a categorical rule; and if, as *First Lutheran* concludes, a final order that *temporarily* deprives a property owner of *all* economically beneficial use is a compensable taking, these propositions ought to readily yield a clear answer, one that does not depend on the majority's elaborate, even arduous, preliminary discussion. (Cf. *Florida Rock Industries, Inc. v. U.S.* (Fed. Cir. 1994) 18 F.3d 1560, 1564-1565 [*Lucas* "teaches that the economic impact factor alone may be determinative; in some circumstances, no balancing of factors is required. If a regulation categorically prohibits *all* economically beneficial use of land -- destroying its economic value for private ownership -- the regulation has an effect equivalent to a permanent physical occupation. There

is, *without more*, a compensable taking." (Fns. omitted, second italics added.)].)

What the Supreme Court's categorical rule in *Lucas* means for property owners, and what the majority refuses to acknowledge, is that after *Lucas*, Justice Holmes's famous apothegm in the *Rock Island Railroad* case, that "Men must turn square corners when they deal with the Government" (*Rock Island & c. R. R. v. United States* (1920) 254 U.S. 141, 143) is now reciprocal. Following *Lucas*, in a limited class of cases, regulators whose *final* action denies an owner *all* beneficial economic *use* of land are on notice that, if their decisions prove wrong when tested in court, the government may face a damages judgment for a temporary taking even if the restraint is later rescinded. In this context at least, it is *government* that must turn square corners when it attempts to overregulate the use of private property or is in danger of "forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." (*Armstrong v. United States* (1960) 364 U.S. 40, 49; *Lucas, supra*, 505 U.S. at p. 1018.)

To further confuse the discussion, the majority plunges into a lengthy disquisition on the connection between the land use regulation at issue here and the legitimate governmental purposes it arguably advances. This, of course, is the formulation developed in *Dolan v. City of Tigard* (1994) 512 U.S. 374, and *Nollan v. California Coastal Comm'n* (1987) 483 U.S. 825, a "nexus" test that is precluded by the categorical rule in *Lucas*. Indeed, the very nature of *Lucas*'s categorical rule appears to bar a court from conducting a case-specific inquiry into those interests that might justify the restraint imposed on the plaintiffs' use of their property by the commission's order. (*Lucas, supra*, 505 U.S. at p. 1015 ["We have ... described ... two discrete categories of regulatory

action as compensable without case-specific inquiry into the public interest advanced in support of the restraint."].)

Although Justice Holmes's caution that when regulation "goes too far it will be recognized as a taking" is foundational to much takings jurisprudence (*Penna. Coal Co. v. Mahon, supra*, 260 U.S. at p. 415), the high court "ha[s] never set forth the justification for this rule." (*Lucas, supra*, 505 U.S. at p. 1017.) As Justice Scalia explains: "Perhaps it is simply ... that total deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation. [Citation.] . . . Surely, at least, in the extraordinary circumstance when *no* productive or economically beneficial use of land is permitted, it is less realistic to indulge our usual assumption that the legislature is simply 'adjusting the benefits and burdens of economic life' [citation] in a manner that secures an 'average reciprocity of advantage' to everyone concerned [citation]. And the *functional* basis for permitting the government ... to affect property values without compensation ... does not apply to the relatively rare situations where the government has deprived a landowner of all economically beneficial uses." (505 U.S. at pp. 1017-1018, italics in original.)

"On the other side of the balance," the *Lucas* majority continued, "affirmatively supporting a compensation requirement, is the fact that regulations that leave the owner of land without economically beneficial or productive options for its use -- typically, as here, by requiring land to be left substantially in its natural state -- carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm. [Citations.] As Justice Brennan explained: 'From the government's point of view, the benefits flowing to the public from preservation of open space through regulations may be

equally great as from creating a wildlife refuge through formal condemnation or increasing electricity production through a dam project that floods private property.' " (505 U.S. at p. 1018.) In short, Justice Scalia concluded, "there are good reasons for our frequently expressed belief that when the owner of real property has been called upon to sacrifice *all* economically beneficial use in the name of the common good, that is, to leave his property economically idle, he has suffered a taking." (505 U.S. at p. 1019, fn. omitted, italics in original.)

It is evident the majority is unwilling to come to terms with the true meaning and operative effect of *Lucas* and *First Lutheran*. At every turn, its opinion reflects the abiding conviction that takings jurisprudence has not advanced a single step beyond the "regulatory friendly" analysis of *Penn Central*. At every opportunity, the majority reverts to *Penn Central's* ad hoc factual inquiry. Limning all this reasoning is the vocabulary of "balance." Instead of confronting the meaning of *Lucas* as it applies in this case, the majority chatters endlessly of "delay ... owing to the mistaken assertion of jurisdiction" (maj. opn., *ante*, at pp. 1-2), " 'normal delay' " (*id.* at p. 2), "normal delay rather than a temporary taking" (*ibid.*), "legally erroneous decision ... during the development ... process resulting in delay" (*id.* at p. 14), "reasonable regulatory process designed to advance legitimate government interests" (*id.* at p. 18), "[m]ere fluctuations in value during the process of government decisionmaking" (*ibid.*), "mistaken assertion of jurisdiction" (*ibid.*), "normal development delay" (*id.* at p. 25), "conditional denial" (*id.* at p. 28), "condition . . . erroneously imposed" (*ibid.*), "plausible . . . though perhaps legally erroneous" (*ibid.*), "postponement of development" (*id.* at p. 31), "bona fide dispute" (*id.* at p. 33), "delay [as] an incident of property ownership" (*ibid.*), and plaintiffs' "unfortunate position of suffering from a delay." (*Id.* at p. 34.) Thus is reality ruthlessly revised. (Cf. *Nollan v. California Coastal*

Comm'n, supra, 483 U.S. at p. 831 ["To say that the appropriation of a public easement across a landowner's premises does not constitute the taking of a property interest but rather. . . 'a mere restriction on its use,' . . . is to use words in a manner that deprives them of all their ordinary meaning."].)

The majority's discussion concludes with a proposition that is flatly incompatible with *Lucas*: "[W]e must determine not whether a sinister purpose lurked behind the [c]ommission's decision, but rather whether the development restrictions imposed . . . *substantially advanced some legitimate state purposes so as to justify the denial of the development permit.*" (Maj. opn., *ante*, at p. 20, italics added.) Had *Lucas* never been decided; had the commission not denied plaintiffs *all* use of their property; had *Penn Central*'s ad hoc test the slightest relevance to this case, the majority's conclusion might have *some* bearing here. But none of these things is true.

The remainder of the majority opinion continues to joust with its own strawman. Yet, to repeat: The test is not "whether the development restrictions imposed on the subject property substantially advanced some legitimate state purposes." (Maj. opn., *ante*, at p. 20.) That formula, lifted from *Penn Central*, simply is no longer relevant under the circumstances here; indeed, the inquiry is barred by Lucas. And the majority's conclusion -- that though the commission may have been "mistaken given the peculiar facts of this case, its position was not so objectively unreasonable as to give rise to the inference that it was adopting that position solely for purposes of delay or some other illegitimate reason" (maj. opn., *ante*, at p. 24) -- is obstinately beside the point.

The majority persistently misstates and mischaracterizes both the issue before us and governing takings law. In the end,

however, the majority is finally forced to concede the meaning of *First Lutheran*: "[*It*]. . . stands for the proposition that once a government action finally denies all economically viable use of property, the fact that the government later rescinds that action after a judicial proceeding does not relieve it of its duty to pay compensation." (Maj. opn., *ante*, at p. 31, italics added.)

Yes, exactly; and *that* is *this* case. As plaintiffs point out, were that not the law, the holding of *Lucas* would be emasculated. If *any* "threshold," "jurisdictional" assertion by a government land use agency that has the effect of barring all economically beneficial use of property can be converted into "the recognition that a judicial determination of the validity of certain *preconditions to development* is a normal part of the development process" (maj. opn., *ante*, at p. 32, italics in original), then, in California, at least for now, *Lucas* is a dead letter.

CONCLUSION

When the answer to every question about what the public needs or wants or should have is always "more," the demand for free public goods is infinite. Against this relentless siphon, the takings clause, and the courts' ardent defense of it, stands as a last lonely bulwark of property rights. It is, and will continue to be a difficult rampart to maintain. That difficulty is built right into our constitutional structure. But, in one area at least we have arrived at a clear understanding: when the government denies all economically viable use of property, even temporarily, it may not achieve its ends "by a shorter cut than the constitutional way of paying for the change." (*Penna.*

Coal Co. v. Mahon, supra, 260 U.S. at p. 416.) In these limited circumstances, government must turn square comers -- except in California.

BROWN, J.

I CONCUR:

BAXTER, J.

2418486.01

APPENDIX B

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION ONE

COURT OF APPEAL -
SECOND DISTRICT
FILED Feb-7 1997
JOSEPH A. LANE, Clerk
SHIRLEY BEAUX, Deputy Clerk

LANDGATE, INC., et al.,	)	
	)	
Plaintiffs and	)	
Appellants,	)	B084315
	)	
v.	)	(Super. Ct. No. BC 024391)
	)	
CALIFORNIA COASTAL	)	
COMMISSION,	)	
	)	
Defendant	)	
and Appellant.	)	
	)	

* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts II and IV.

APPEAL from a judgment of the Superior Court of Los Angeles County. Richard C. Hubbell, Judge. Reversed in part, affirmed in part and remanded.

Daniel E. Lungren, Attorney General, Roderick E. Walston, Chief Assistant Attorney General, Jan S. Stevens, Assistant Attorney General, Peter Kaufman and Joseph Barbieri, Deputy Attorneys General, for Defendant and Appellant.

Reznik & Reznik, Fred N. Gaines and Kevin M. Kemper for Plaintiffs and Appellants.

In October 1990, Landgate, Inc. applied to the California Coastal Commission for a coastal development permit to build a house and related structures on its lot in the Malibu hills. The Commission asserted that the lot--approved by the County of Los Angeles when owned by Landgate's predecessor in interest--was unlawful because it lacked Commission approval. The Commission denied Landgate's coastal permit application. Landgate successfully petitioned the trial court for a writ of mandate challenging the permit denial and successfully defended on appeal the trial court's grant of the writ. Landgate then returned to the trial court to resolve the remaining "taking" claims.

The Commission appeals from the judgment awarding compensation for inverse condemnation, prejudgment interest, and attorney fees and costs. The Commission claims the trial court erred in granting Landgate's motion for summary adjudication on its third cause of action, which alleged that the Commission had, by its February 1991 permit denial, deprived Landgate of all economically viable use of its land and thus temporarily "taken" that land without paying the constitutionally required "just compensation." The Commission also argues the trial court erred in awarding Landgate $155,657 in temporary taking damages following trial on the subject of damages.

Landgate cross-appeals, claiming (1) it was entitled to Code of Civil Procedure section 1036 expenses incurred in the writ of mandate proceeding,(2) the court should have adopted the fair rental value method of assessing damages, and (3) the court erred in dismissing Landgate's 42 United States Code section 1983 cause of action and refusing to allow Landgate to identify Commission members and Commission staff personnel individually as Doe defendants in that claim.

In the published portion of this opinion, we affirm the trial court's ruling that the Commission's denial of the permit temporarily deprived Landgate of all economically viable use of its lot and thus constituted a categorical taking under the Fifth Amendment to the United States Constitution and article I, section 19 of the California Constitution. We also reverse and remand with respect to the trial court's denial of Landgate's request for Code of Civil Procedure section 1036 expenses incurred for the writ of mandate proceeding.

In the unpublished portion of the opinion, we reverse that portion of the damages award attributable to property taxes for the relevant period, affirm the balance of the award, and affirm the dismissal of Landgate's 42 United States Code section 1983 cause of action and the grant of the Commission's motion to quash service of summons on individual Commissioners and staff members.

FACTS

Before 1973, a large unimproved tract in the Malibu hills was approved for subdivision into approximately two-acre lots, each zoned for a single-family home. After the subdivision, Landgate's predecessor in interest owned two parcels which ran north and south. The northern portions were sloped, the southern portions were flat. One of the lots contained a single family home on its flat southern portion. Both lots lie within the coastal zone in the County of Los Angeles.

In the mid 1980's, the County planned to improve an east-west road through the two lots. The proposed road would divide the two lots into one northern lot and one southern lot. The landowner and the County agreed that, in exchange for the owner's dedicating portions of the parcels for the roadway

easement, the County would reconfigure the lots into a single, sloped lot north of the road and a single, flat lot south of the road, each still zoned for a single family home.

The County completed the road improvement and formally approved the lot reconfiguration, which was recorded July 5, 1989. At that point, the Commission had approved the County's Malibu land use plan, but at all relevant times had not certified a County Malibu local coastal program. The lots' owner did not seek or receive Commission approval of the lot line adjustment. The Commission did not challenge the County's approval of the reconfiguration.

In October 1990, Landgate bought the sloped northern 2.45 acre lot and applied for and received County approval in concept of grading and building plans for a single-family home to be built on the property.[1] Landgate applied to the Commission for a permit to build the house and related structures and the Commission scheduled the matter for its December meeting in San Diego.

Landgate's October 12, 1990, permit application sought approval of the house and related structures. The plans called for a 9,036 square foot home, a guest house and swimming pool and 8,500 cubic yards of grading. In a November 1 letter, Commission staff requested additional materials in connection with the application. In late November, Landgate's representative first learned from staff that the lot line adjustment was going to be an issue in connection with the

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1/ Landgate's first amended petition/complaint, filed November 19, 1993, added Peter and Punte Bogart, who "owned and controlled" Landgate as plaintiffs. The Bogarts held a life estate in the subject lot. We refer to the Bogarts and Landgate collectively as "Landgate."

application. Before the original staff report was prepared, Landgate modified its proposal by reducing the house to 7,500 square feet, eliminating the guest house and changing other structures, and reducing proposed grading to 4,300 cubic yards.

According to the November 1990 staff report, development along the road or "overview" for which the Landgate house was proposed was "limited to two existing single family residences." Although there was "no existing or planned-for development along the inland or northern side of the overview[,] ... there [was] a three-lot subdivision ... which was approved with conditions at the December, 1990... Commission hearings. This subdivision is just north and west of the overview."

At its December 13 meeting in San Diego, the Commission first considered the now-reduced project, which, according to the staff report, proposed to build on an illegal lot and violated visual resources (views from a trail in a tributary of Escondido Canyon below the south side of the road) and landform alteration (grading) requirements. The Commission voted to continue the matter due to questions concerning the legality of the lot under the California Coastal Act of 1976 (Pub. Resources Code, § 30000 et seq.) because the Commission had not approved the County's lot line adjustment.

According to the declaration of its engineer/representative in support of Landgate's motion ("Petrovsky Declaration"), "once the lot line adjustment issue was raised ... the [Commission] staff would not negotiate with regard to the issues of the size of home, grading, etc. Instead, the legality of the lot became the focus of their attention." Landgate then reapplied for a coastal development permit, adding a request for Commission approval of the County lot line adjustment.

At its February 7, 1991, meeting, the Commission denied Landgate's application, finding, among other things and over Landgate's objection, that the lot itself constituted an impermissible "development" under the Coastal Act because it was created without Commission approval, and that the proposed house and related structures would produce excessive soil, grading, and visual degradation.[2]

At the hearing, the District Director, who presented staff's recommendations, told the Commission, "The lot line adjustment changed the configuration of the two lots so that instead of being long, narrow lots, you now have two lots with the lot line being located at the center line of [the road]. [¶] What this does is it results in two lots, one of which is on the down slope side of [the road] and is much steeper than the area located on the up slope side of [the road]. [¶] Staff would suggest that this lot line adjustment not be approved, that it would be preferable to concentrate the development on the two lots on the up slope side of [the road] where the property is more level."

After Petrovsky, Mr. Bogart, and others spoke, one Commissioner asked the District Director whether he was "right ... to say that if the lot line adjustment came before us, you would have recommended denial?" The District Director

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2/ " 'Development' means ... the placement or erection of any solid material or structure; discharge or disposal or any dredged material or of any gaseous, liquid, solid, or thermal waste; grading, removing, dredging, mining, or extraction of any materials; change in the density or intensity of use of land, including, but not limited to, subdivision . . . and any other division of land, including lot splits, . . . ; construction, reconstruction, demolition, or alteration of the size of any structure...." (Pub. Resources Code, § 30106.)

replied, "That is correct." Shortly thereafter, the Commission denied the application.

Immediately after the vote, another Commissioner said that the issue of "the County's refusal to recognize our right to review lot line adjustments" was "an issue that ha[d] come before [the Commission] many, many times in the Malibu area." She added it was "really time to become extremely serious about this" and asked that staff counsel be directed to communicate with the County on the topic. The Commission's Chief Counsel said he would draft the letter for the Chairman's signature.

On April 11, 1991, the Commission denied Landgate's reconsideration request, which included a newly modified proposal reducing the height to 32 feet above natural grade and reducing grading to approximately 500 cubic yards. After Landgate's representative described the revised project, staff advised the Commission that Landgate was not requesting reconsideration in terms required by statute, but was describing a new project, for which it was free to apply.[3]

The District Director told the Commission, "One of the problems I think is that staff has indicated that in your denial of this project part of the basis for your denial was the lot line adjustment and that we told them even if they make these modifications we'll still recommend denial." Chief Counsel told

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3/ Public Resources Code section 30627, subdivision (b)(3) provides: "The basis of the request for reconsideration shall be either that there is relevant new evidence which, in the exercise of reasonable diligence, could not have been presented at the hearing on the matter or that an error of fact or law has occurred which has the potential of altering the initial decision."

the members, "[W]ithout the lot line adjustment some of these revisions are I think irrelevant." Counsel also told the Commission, "This project does not work, if you please, without that lot line adjustment."

The Commission's Executive Director advised the members that "even with this new information [that Landgate was proposing], had it been presented at [or before the February 1991 meeting], . . ., without your willingness to change the lot line, [the] information wouldn't have led to a different result." The Commission followed staff's recommendation to deny the reconsideration.

Landgate sued and, among other relief, petitioned for issuance of a writ of mandate directed to the Commission. On October 24, 1991, the trial court issued the writ, vacating the Commission's denial of the project and ordering it to reconsider the application assuming the lot reconfiguration valid. The Commission scheduled the matter for its November 14, 1991, San Diego meeting. Landgate prepared for and traveled to the meeting, but the Commission continued the matter until its December meeting without conducting a hearing.

On November 21, 1991, the Commission filed a return stating the parties were exploring settlement involving approval of a smaller project on Landgate's lot. According to the return, the parties were exploring a resolution of the litigation, including Landgate's presentation of a downsized project in exchange for Landgate's agreement to drop its remaining causes of action and withdraw certain portions of its claim for costs and attorney fees. Instead, the Commission appealed the grant of the writ. We affirmed the order issuing the writ of mandate, holding that under the facts of this case, the lot line adjustment was not a new "development" within the

meaning of the Coastal Act. We held that the Commission had no jurisdiction to deny the permit on that ground.

On February 16, 1993, the Commission approved Landgate's application for a 7,500 square foot, 35 foot high, single-family residence, with a swimming pool, garage, and septic system. Grading involved 2,983 cubic yards. The approval was subject to special conditions which included submission of revised plans for the Executive Director's approval. The plans were to show that the height of the house did "not exceed ... 28[] feet above existing grade or finished grade, whichever is more restrictive."

According to the relevant staff report, the proposed residence was 30 feet in height when nearest the road, 35 feet in height from existing grade in the section extending down the hillside, and would be 15 feet above existing grade for part of where it paralleled the road. In addition, according to staff, "the only development visible from the [Escondido Canyon Trail] ... is the roofline of the tower of an existing residence and a home under construction, both on the Overview ridgeline. However, at least one single-family residence has been approved on the Overview, as well as the Shriner three-lot subdivision to the west on [the same road as the Landgate property]. The Shriner subdivision includes lots above and below the road." Other statements in the report reflect other project approvals in the area overlooking the trail.

After issuance of our remittitur, Landgate sought summary adjudication on its third cause of action ("Taking of Property Without Just Compensation"). Landgate argued its claim was meritorious and without defense because (1) Landgate had been "deprived, at least temporarily, of all economically viable or productive use of its property" because, "at least temporarily, [it] could not legally obtain any valid permits or

approvals to construct any project on its property as a result of the Commission's actions." Landgate also argued (2) the Commission's actions did not "substantially advance any legitimate State interest," and (3) it had been "deprived, at least temporarily, of all reasonable investment-backed expectations with regard to its property" because it "at least temporarily, could not legally obtain any valid permits or approvals to construct any project on its property as a result of the Commission's actions." The trial court granted Landgate's motion, ruling that the Commission's actions had at least temporarily deprived Landgate of all economically viable use of its property. The court awarded Landgate $155,657 in damages. The Commission appeals.

DISCUSSION

Standard of Review

As relevant, Code of Civil Procedure section 437c provides that a party may move for summary adjudication as to a cause of action if that party contends there is no merit to an affirmative defense to that cause of action. The motion is to be granted only if it completely disposes of that affirmative defense. (Code Civ. Proc., § 437c, subd. (f)(1).) A plaintiff meets his burden of showing there is no defense to a cause of action if he has proved each element of his cause of action. If the plaintiff meets that burden, the burden shifts to the defendant to show that one or more triable issues of material facts exist as to the cause of action or the defense thereto. (Code Civ. Proc., § 437c, subd. (o)(1).)

" 'In reviewing an order granting, or denying, a motion seeking a summary adjudication of particular issues, we are governed by the rules applicable generally to a review of

summary judgments.' [Citation.] 'An appellate court determines de novo whether there is a genuine issue of material fact and the moving party was entitled to ... summary adjudication as a matter of law.' [Citation.]" (*Hansen Mechanical, Inc. v. Superior Court* (1995) 40 Cal.App.4th 722, 726-727.)

I

Temporary Taking

In its third cause of action, Landgate alleged that the Commission's permit denial constituted a taking of property under both the federal and state constitutions. The Fifth Amendment of the United States Constitution provides that private property shall not "be taken for public use, without just compensation." This prohibition was made applicable to the States by the Fourteenth Amendment. (See *Chicago, Burlington &c. R'D v. Chicago* (1897) 166 U.S. 226.) Article I, section 19 of the California Constitution provides that "[p]rivate property may be taken or damaged for public use only when just compensation ... has first been paid to, or into court for, the owner...."

Lucas v. South Carolina Coastal Council (1992) 505 U.S. 1003, offers the best guidance for resolution of this temporary taking claim. In *Lucas*, the high court confronted South Carolina's 1988 Beachfront Management Act, "which had the direct effect of barring [Lucas] from erecting any permanent habitable structures on his two [beachfront] parcels." (*Id.* at p. 1007.) The issue was "whether the Act's dramatic effect on the

economic value of Lucas's lots accomplished a taking of private property under the Fifth and Fourteenth Amendments requiring the payment of 'just compensation.' [Citation.]" (*Ibid.*)

Lucas had bought his two lots after the state enacted its original coastal zone management act in 1977, under which he was not required to obtain a permit in advance of any development. He intended to build two single-family homes, as owners of adjacent parcels had already done. Lucas commissioned architectural drawings. The 1988 Act ended his plans by prohibiting development of lands located, like his, within an area seaward of a coastal erosion baseline established pursuant to the statute.

Lucas filed suit. He did not challenge the state's authority under the police power to enact the ban. Instead, he claimed the Act's complete extinguishment of his property's value entitled him to compensation. The trial court agreed, finding, among other things, that when Lucas bought the lots both were zoned for his intended use and no restrictions were placed thereon by state or local law. The trial court also found that the Act decreed a permanent ban on construction on Lucas's lots, eliminated the unrestricted use, and rendered them valueless, thus concluding that the properties had been "taken" by operation of the Act. The court ordered the state to pay just compensation of $1,232,387.50.

The South Carolina Supreme Court reversed, troubled by Lucas's failure to challenge the validity of the Act itself. In the absence of such an attack, "the court believed itself bound to accept the 'uncontested ... findings' of the [state] legislature that new construction in the coastal zone--such as [Lucas] intended--threatened this public resource. [Citation.]" (*Lucas v. South Carolina Coastal Council, supra,* 505 U.S. at p.

1010.) The South Carolina court ruled that when a land use regulation is "designed 'to prevent serious public harm,' [citations], no compensation is owing under the Takings Clause regardless of the regulation's effect on the property's value."(*Ibid.*)

The United States Supreme Court rejected the state court's approach. The high court referred to its history in the area of uncompensated taking by overregulation and concluded, "In 70-odd years of . . . 'regulatory takings' jurisprudence [after the decision in *Pennsylvania Coal Co. v. Mahon* (1922) 260 U.S. 393], we have generally eschewed any '"set formula"' for determining how far is too far, preferring to 'engag[e] in ... essentially ad hoc, factual inquiries.' [Citations.] We have, however, described at least two discrete categories of regulatory action as compensable without case-specific inquiry into the public interest advanced in support of the restraint. The first encompasses regulations that compel the property owner to suffer a physical 'invasion' of his property.... [¶] The second situation in which we have found categorical treatment appropriate is where regulation denies all economically beneficial or productive use of land. [Citations.] As we have said on numerous occasions, the Fifth Amendment is violated when land[]use regulation 'does not substantially advance legitimate state interests *or denies an owner economically viable use of his land*.' [Citation.]" (*Lucas v. South Carolina Coastal Council, supra,* 505 U.S. at pp. 1015-1016; fns. omitted.)

After this court affirmed that the Commission had no jurisdiction to deny the permit on the basis of the lot line adjustment, the Commission granted the conditioned permit described above. In ruling on Landgate's later motion for summary adjudication on the taking issue, the trial court found that the Commission's February 1991 denial of the permit

application "deprived [Landgate], at least temporarily, of all economically viable or productive use of its property insofar as Landgate ... could not legally obtain any valid permits or approvals to construct any project on its property as a result of the Commission's actions."

Petrovsky stated in his declaration that he had handled at least 15 Commission matters before Landgate's and was "very familiar with the procedures and requirements for construction in the Coastal Zone." He explained that normally the application for a project marked the beginning of negotiations concerning the size of a home, grading, and other construction-related factors. "Through a negotiated process, a resolution is typically reached with regard to the size of the home, amount of grading and other issues."

We agree that the Commission's permit denial caused a taking of Landgate's property. The Commission argues that its 1991 permit denial was not, in the language of *Lucas*, one of those "extraordinary circumstance[s]" in which government actions are found to deprive landowners of all economically viable use. (*Lucas v. South Carolina Coastal Council, supra*, 505 U.S. at p. 1017.) The Commission does not argue that a viable use of the land remained after the permit denial. Instead, the Commission contends the two-year hiatus was the result of its "mistake" concerning the lot line adjustment, which resulted in the kind of typical temporary delay which is noncompensable under the takings clause.[4] The

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4/ The Commission relies on a number of noncompensable delay cases which we find factually driven and distinguishable or not binding on this court. For example, in *Del Oro Hills v. City of Oceanside* (1995) 31 Cal.App.4th 1060, the landowner/developer raised a facial challenge to a voter-enacted growth control ordinance which permitted only

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4/ (...continued)
staged development. The undisputed facts established that the property was eventually sold and used for the planned purpose.

In *Guinnane v. City and County of San Francisco* (1987) 197 Cal.App.3d 862, the landowner bought four, adjoining vacant lots in 1979. In July 1980, the city planning commission and recreation and parks commission designated an area which included the lots for study for possible acquisition as a park. The area was included in the recreation and open space element of the city's master plan. In September 1980, the landowner applied for a building permit to build four houses on his lots. The planning department required preparation of an environmental impact report. The Landowner hired a consultant to prepare the document. In October 1981, the park study was completed and the two city agencies recommended purchase of only a portion of the subject area. The area to be bought did not include the four lots. Two months later, the planning commission amended the master plan to permit construction on lots not to be acquired, and the following month rescinded its requirement of an EIR for the landowner's proposed project. In connection with preparation of the negative declaration the planning department decided would suffice as environmental review, the department asked the landowner for certain supporting information. It took the landowner more than three years to submit the information. In October 1985, the city issued an amended negative declaration in response to public comment. Meanwhile, the landowner had filed suit in 1982. The landowner sued before the environmental review was completed and the record did not show whether any final action had been taken on the new building permit the landowner had filed after his original application had been cancelled because of his failure to supply information. When the city's motion for summary judgment was heard in February 1986, the new application had not yet been acted on.

In *Tabb Lakes, Ltd. v. U.S.* (Fed. Cir. 1993) 10 F.3d 796, the landowner began filling wetlands without a permit and then sued for compensation for an alleged taking when the United States Army Corps
(continued...)

Commission points out that the regulatory process is complex (including disputes over sufficiency of the applicant's submitted information, geographical boundaries of an agency's jurisdiction and of a landowner's property, and, as in this case, an agency's authority to require a permit) and that "regulatory agencies ... sometimes make mistakes in resolving these issues."

We recognize, as Petrovsky suggested, that the regulatory process necessarily involves reasonable delay to the landowner. We realize, as well, that mistakes sometimes, but certainly not inevitably, occur as part of the review process. What we cannot accept is the Commission's characterization of the treatment of Landgate here as the reasonable result of a "mistake." Nothing in the record suggests that the lot line adjustment issue arose out of anything other than the Commission's ongoing jurisdictional spat with the County of Los Angeles combined with a desire to prevent Landgate from building on its parcel. Instead, the overwhelming sense of the record is that by its insistence that the lot itself was illegal, the Commission put Landgate in a situation which was not of

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4/ (...continued)
of Engineers issued a cease and desist order. The appellate court held, inter alia, that the delay caused by the cease and desist order was neither extraordinary nor in bad faith and, even if the landowner's ability to sell the property was affected by the order, the order only delayed development. (*Id.* at p. 800.)

In contrast, in this case, Landgate applied for a permit to build the house and was negotiating with Commission staff before the lot line adjustment issue arose. Landgate had bought a lot approved by the County. The Commission's action, taken in excess of its jurisdiction, left Landgate not only unable to use its land but unable even to negotiate for a different project.

Landgate's own making and which Landgate could do nothing to cure. In short, this was not a case of bureaucratic bungling, but a declaration of war between governmental behemoths in which the inevitable casualty was to be a noncombatant, Landgate. The Commission, with apparent indifference to the consequences on its applicant, denied the permit without the jurisdiction to do so. The direct effect was to prevent Landgate from, as the trial court put it, "construct[ing] any project on its property."[5]

The facts of this case speak for themselves. When it denied the coastal permit, the Commission went too far and denied Landgate all economically viable use of its property, preserving it as open space. As *Lucas* states, "[T]he fact that regulations that leave the owner of land without economically beneficial or productive options for its use--typically, as here, by requiring land to be left substantially in its natural state--carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm. [Citations.]" (*Lucas v. South Carolina Coastal Council, supra*, 505 U.S. at p. 1018.)

5/ It appears that Landgate tried to meet Commission staff's concerns about the County-approved reconfiguration by modifying its original application, so that at the February 1991 meeting, the project included a request for Commission review of the reconfiguration. We question whether, despite its apparent desire to comply with staff's wishes, Landgate was in a position to rightfully ask for that review. It did not own both of the original lots, and did not own any land south of the road. Thus, the effect of its "reapplication" and, indeed, certain aspects of the staff report for the February 1991 meeting gave an unreal quality to the process with staff's conclusion "that the least environmentally damaging site for development is on the coastal [south] side of [the road] and that the original lot configuration of long thin parcels extending across the road should not be altered."

As in *Lucas*, the trial court here found that the permit denial deprived Landgate of all economically viable use of its land. Our review of the record leads us to the same conclusion. Faced with the lot line adjustment issue to which it had not contributed and which had the effect of prematurely ending the normal negotiating process, Landgate was put in an unworkable position. When its permit to build a single family residence was denied because of that same issue, Landgate was left with no economically viable use of its land.

The Commission contends, in the alternative, that its assertion of permit jurisdiction did not constitute a taking because Landgate did not establish its right to a permit before the alleged taking. The Commission posits that its denial was based independently on the project's conflict with Coastal Act policies regarding grading and visual intrusion and, therefore, even had it not reached the lot line adjustment issue, the Commission's permit denial would have been proper. Thus, the Commission argues, Landgate did not establish its entitlement to a permit until after additional changes were made and Landgate accepted permit conditions imposed at the February 1993 meeting. As a result, the argument continues, the February 1991 denial did not constitute a taking.

As we already have noted, in his declaration in support of the summary adjudication motion, Petrovsky, experienced in matters involving the Commission's process, explained that typically the application for a project marked the beginning of ultimately successful negotiations concerning the size of a home, grading, and other construction-related factors. However, Commission staff ceased normal negotiations with the applicant after staff raised the lot line adjustment issue, an issue over which Landgate claimed the Commission lacked jurisdiction. Staff's position remained unchanged and was

conveyed to the Commission, which denied the permit pursuant to staff's recommendation.

The Petrovsky Declaration and statements of Commission staff, chief counsel, and Commissioners quoted in our factual summary above support our conclusion that the lot line adjustment was pivotal in the permit denial and in the denial's complete prohibition of any development on Landgate's lot. So long as the Commission held to its finding that the reconfiguration remained a subject for its review, Landgate could not negotiate to obtain the permit necessary to build a house on its County-approved lot. Not until two years after its original denial did the Commission approve a project for the Landgate property.

The Commission's ultimate approval of the house for the Landgate property, after the reconfiguration issue had been laid to rest, validates our conclusion that the lot line adjustment issue was the determinative basis for the denial. Despite the Commission's current protestations to the contrary, hindsight shows clearly that visual impact and grading issues were not pivotal in the 1991 permit denial if only because in 1993, shortly after the remittitur was final in the preceding appeal, the Commission approved a single family residence for the property. At that point, the project was described as a 7,500 square foot, 35-foot high, single family residence, with swimming pool, garage, and septic system and grading of 2,983 cubic yards. The only difference between these facts and the rejected 1991 project was a grading reduction of approximately 1,300 cubic yards, apparently proposed by Landgate.[6]

6/ According to the relevant staff report, project plan changes were: "reduction in grading from 4300 [cubic yards] to 2983 [cubic yards], (continued...)

It is true, as the Commission points out, that its ultimate approval of the project was conditioned and that the conditions included a height limitation, which appears to have resulted in some reduction in height. However, as Landgate points out, the Commission could have imposed special conditions on matters such as height in February 1991, had it not been so intent on reviewing the County's lot line adjustment.

Additional substantiation that the lot line adjustment was the basis for the permit denial comes from the fact that, as we interpret relevant staff reports, the Commission had approved at least two homes on the same sloping north side of the road as Landgate's parcel. Those approvals are clear indications that but for the lot line adjustment issue, Landgate's application to build the house and related structures on its property could and would, through the normal negotiation process, have been approved by February 1991 or shortly thereafter. Instead, the Commission's unlawful preoccupation with the lot line adjustment made it impossible for Landgate to move forward with an economically viable use of its property. We thus reject the Commission's suggestion that no taking occurred because

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6/ (...continued)
reduction in the size of fill slopes, change in the driveway entry design from a rectangular courtyard concept to a hammerhead turnaround, elimination of the guest house, relocation of the pool to up near the road, and elimination of a subterranean area of the residence." As we interpret this language, the grading reduction was thus largely the result of changing the driveway design, eliminating the guest house, relocating the pool, and eliminating a subterranean part of the house.

We note as well that the final grading number was considerably higher than the approximately 500 cubic yards described by Landgate at the April 1991 Commission hearing when Landgate's reconsideration request was denied.

Landgate could not establish their entitlement to a coastal permit.

II

Damages

Following a bench trial, the court awarded Landgate temporary taking damages of $155,657. It first set the period of the taking as beginning with the date of Commission's permit denial (February 7, 1991) and ending with the date the Commission issued a permit (February 16, 1993).[7] The court then determined that the "temporary lost value" of the property was $675,000, based on the conclusion that the property was worth $675,000 when bought for that price (a figure both experts agreed represented the property's value before the permit denial) and had been "rendered worthless" by the denial (as testified by Landgate's expert).[8] The court then multiplied $675,000 by a 10 percent rate of return (as recommended by Landgate's expert) for the period of the taking. The court next added $17,214 in property taxes (which it found had been paid on the property over the two years) plus a 10 percent rate of return thereon. We affirm.

7/ The court thus rejected Landgate's claim to taking damages allegedly incurred before the permit denial and after the permit was issued. Landgate does not appeal that aspect of the award.

8/ The Commission's expert testified the property lost 50 percent of its value because of the permit denial.

A. The Method of Calculation

Both parties claim trial court error with respect to the damages award. The Commission raises three challenges: (1) the court improperly based its calculations on the entire value of the property; (2) it improperly used 10 percent as the market rate of return; and (3) it awarded compensation for property taxes that were based on an inaccurate assessed property value. Landgate says the court should have used the fair rental value method as the basis for the damages calculation, i.e., the award should have been "based upon what the property would have been worth to [Landgate] had [Landgate] developed the property as ... planned...." Landgate's expert placed that value at $744,155.

The Commission acknowledges that pertinent case law reveals "there is no general formula for awarding damages for a temporary taking, and that an owner's indemnity may be measured in various ways depending on the circumstances...." The Commission espouses as applicable here the formula set forth in *Wheeler v. City of Pleasant Grove* (11th Cir. 1987) 833 F.2d 267, 271. After acknowledging that the question to be asked when calculating compensation for a taking is the owner's loss, the *Wheeler* court formulated its approach. "In the case of a temporary regulatory taking, the landowner's loss takes the form of an injury to the property's potential for producing income or an expected profit. [Citation.] The landowner's compensable interest, therefore, is the return on the portion of fair market value that is lost as a result of the regulatory restriction. Accordingly, the landowner should be awarded the market rate return computed over the period of the temporary taking on the difference between the property's fair market value without the regulatory restriction and its fair market value with the restriction. [Citation.]" (*Ibid.*)

We find *Wheeler* factually distinguishable. The property was under contract between sellers, Mr. and Mrs. Wheeler, and a developer/buyer. The buyer had made a $1,000 down payment, had seen the project through an Alabama city's planning commission approval, and had paid for and received city building permits to construct an apartment complex, when the city council enacted an ordinance banning construction of apartment buildings. The Wheelers and the developer sued the city. The sale apparently had fallen through. One of the issues on appeal was the question of allocation of damages between the plaintiffs. Both plaintiffs were, however, clearly interested in the land only as a matter of investment, unlike the situation in this case. The loss of potential income was pivotal to the appellate court, which criticized the trial court's analysis because it did not take into account the Wheelers' "loss as measured by the formula we set forth ... that is, the loss in income-producing potential...." (*Wheeler v. City of Pleasant Grove, supra*, 833 F.2d at p. 271.)

Moreover, the *Wheeler* plaintiffs did not raise a Fifth Amendment takings claim. Instead, they brought suit under federal civil rights statutes (42 U.S.C. §§ 1983, 1985) and alleged due process violations under the Fourteenth Amendment. (*Wheeler v. City of Pleasant Grove* (5th Cir. 1981) 664 F.2d 99.) Thus, in contrast to this case, the Fifth Amendment takings question of whether any economically viable use of the land remained was not at issue.

Landgate, on the other hand, asks too much of the decision in *First Lutheran Church v. Los Angeles County* (1987) 482 U.S. 304. *First Lutheran* was a remedies case. The case began its appellate trek after the trial court granted the County's motion to strike the amended complaint's allegations that County enactment of an interim ordinance banning construction or reconstruction in a mountain area flooded a

year earlier had denied plaintiff all use of property it owned in the flooded area. (The property was a camp improved with buildings.) The high court held that the just compensation clause of the Fifth Amendment requires government to pay for temporary regulatory takings.

Landgate offers *First Lutheran* as support for its claim that the rental value method should have been adopted by the trial court in this case. While *First Lutheran* does not reject a rental value method, and indeed discusses it in the context of compensation awards for direct temporary takings of built-out properties by the federal government during World War II, the court used the World War II cases to make its point that "'temporary' takings which, as here, deny a landowner all use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation. [Citation.]" (*First Lutheran Church v. Los Angeles County, supra*, 482 U.S. at p. 318.) As Landgate acknowledges, however, the court refused to sanction any specific method of calculating damages resulting from a temporary regulatory taking.

Moreover, the cases cited in *First Lutheran*, and by Landgate, involved developed property with an existing use, or a readily calculable value based on an existing lease, not, as here, a vacant parcel intended for development into a single family residence. The state of the property in those cases eliminated the need to speculate about value. In contrast, Landgate's argument requires a court to assume the existence of the house it intended to build. The trial court would have been justified under the circumstances in rejecting the rental value approach because it was too speculative.

Neither the Commission nor Landgate cites binding case law or statute concerning the measure of damages for a

temporary taking of an undeveloped residential parcel, and we are not prepared to declare that a particular method of calculation must be applied where such a taking occurs. Choice of the proper method seems to depend on the particular facts of a case. The trial court's choice of the "garden variety appraisal" approach was appropriate in this case.[9]

The court was entitled to reject Landgate's expert's conclusion that rental value was the appropriate measure and to accept the Commission's expert's testimony that using a lost rental value method on a proposed structure was illogical. Similarly, the court was entitled to reject the investment-based *Wheeler* approach, as Landgate's expert had done, and accept the alternative suggested by the Commission's expert.

In the absence of controlling authority to the contrary and in light of supporting expert testimony, we find nothing irrational or unreasonable in the trial court's choice of which method of calculation was appropriate in this case. On the contrary, we conclude the court's choice was proper.

B. Rate of Return

The Commission contends the trial court should have used the 5 percent rate of return suggested by its expert, rather than the 10 percent offered by Landgate's expert. The Commission claims the choice of 10 percent "was not supported by substantial evidence because it was based on a mistaken

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9/ The Commission's expert described his alternative as "a common ordinary garden variety appraisal which is exactly what I would do if a governmental agency were acquiring the property for two years for a construction site."

assumption about the rate of prejudgment interest in inverse condemnation cases."

Landgate's expert testified in her deposition that she based her 10 percent figure on "prejudgment interest." At trial she testified that she based her choice of 10 percent on "a market rate of interest which I assumed at 10 percent based upon rental, based upon borrowing cost and also pre[judgment] interest as well of 10 percent per year." As we understand this evidence, the trial court would have been justified in concluding that the expert's choice of a 10 percent rate of return was not, as the Commission asserts, based solely on the prejudgment interest rate. As a result, the Commission's contention fails.

C. Property Tax Award

The trial court found that Landgate "expended $17,214 on property taxes for the subject property over the two year taking period." The Commission claims insufficient evidence supported that finding, but takes issue only with the amount of the award, arguing that since, according to its expert's testimony, the assessed value of the property was $337,500, not $675,000, the property tax for the period was only $8,648.

The critical question, however, was not a theoretical assessment of the property's value, but the amount actually incurred or paid in taxes during the relevant period. While such an amount is easily established, for example, with cancelled checks or a tax bill, the record does not show what Landgate paid or incurred in taxes. Landgate asks us to take judicial notice of a "Certificate of Payment" from the Los Angeles County Tax Collector attached as an exhibit to its respondent's brief. The Commission replies that the certificate

shows neither the amount of taxes actually assessed nor the amount actually paid. We decline Landgate's request for judicial notice because it is pointless. The certificate deals only with assessed value and does not establish the fact or amount of the liability. There was no substantial evidence to support the award of property taxes.

III

Code of Civil Procedure Section 1036 Expenses

On its cross-appeal, Landgate also contends the trial court erred in denying its request for attorney fees incurred in the writ of mandate proceeding.

After prevailing on its petition for writ of mandate in the trial court, Landgate moved for attorney fees and costs under Code of Civil Procedure section 1036 (hereinafter section 1036). The trial court denied the attorney fees request and awarded $619.50 (of $63,647.18 requested) in costs. We awarded Landgate its costs on appeal in its successful defense of the trial court's ruling. The Commission ultimately paid Landgate $1,434.01 for litigation costs arising from the mandate proceedings.

Following the damages trial, Landgate sought just under $403,000 in attorney fees ($266,100) and costs ($136,714.27) for the entire action pursuant to section 1036, including costs and $155,351 in attorney fees for the trial and appellate defense in the writ of mandate proceeding. The trial court denied fees and costs for the writ proceeding and awarded Landgate $122,395.73 in attorney fees ($99,269) and costs ($23,126.73) incurred during the inverse condemnation proceeding.

At the time of the trial court's determinations, section 1036 provided, as pertinent: "In any inverse condemnation proceeding brought for the taking of any interest in real property, the court rendering judgment for the plaintiff by awarding compensation for such taking, . . . , shall determine and award or allow to such plaintiff, as a part of such judgment . . . , such sum as will, in the opinion of the court ...,reimburse such plaintiff for his reasonable costs, disbursements, and expenses, including reasonable attorney, appraisal, and engineering fees, actually incurred because of such proceeding."[10] (Emphasis added.)

Landgate's pleading in the trial court was titled, "Verified Petition for Writ of Mandate and Complaint for Declaratory Relief, Taking Without Just Compensation and Deprivation of Civil Rights." (Some caps. omitted.) Landgate moved to "sever" the proceeding under Code of Civil Procedure section 598, so that the first two causes of action, for writ of mandate and declaratory relief, could be heard first, receiving calendar preference, and the remaining causes of action be tried, or otherwise addressed, in the normal course of events.[11]

10/ Effective January 1, 1996, section 1036 was amended, as relevant, to extend its application to "any appellate proceeding in which the plaintiff prevails on any issue in that proceeding."

11/ Code of Civil Procedure section 598 grants a court discretion following notice and a hearing, upon written motion, timely made, to order "that the trial of any issue or any part thereof shall precede the trial of any other issue or any part thereof in the case" "when the convenience of witnesses, the ends of justice, or the economy and efficiency of handling the litigation would be promoted thereby."

(continued...)

Landgate says it was entitled to section 1036 costs and fees for the entire proceeding, including the writ of mandate proceeding, because success on its claim that the Commission had overstepped its jurisdiction and the consequent invalidation of the permit denial was, under California case law, a prerequisite to litigation of its right to damages.

The Commission does not dispute Landgate's assertion that resolution of the mandate claim was a prerequisite to pursuing its inverse condemnation claim.[12] Instead, the Commission says that Landgate's argument is "irrelevant to the issue of reimbursement under section 1036" because the statutory language describes eligible expenses only as those "'actually incurred' in the inverse condemnation proceeding" and

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11/ (...continued)

"Severance is, in effect, the 'flip side' of consolidation: i.e., it is the procedure whereby the court may order separate trials of issues or parties joined in a single action. [¶] Where a separate trial is ordered on the issue of liability, the procedure is commonly referred to as 'bifurcation.' But it is still a severance and governed by the Code provisions applicable to severance. (The objective of bifurcation ... is to avoid wasting time and money on the trial of damages issues if the liability issue is resolved against the plaintiff.) [Citation.]" (Weil & Brown, Cal. Practice Guide: Civ. Proc. Before Trial (Rutter 1996) Case Management & Trial Setting, § [12:406], p. 12(1)-76.) Code of Civil Procedure section 598 bifurcation also "prevents possible prejudice to a defendant where a jury might look past liability to compensate a plaintiff through sympathy for his or her damages." (Id. at § [12:414], p. 12(1)-78.)

12/ Indeed, in the trial court, the Commission argued in support of its demurrer to all seven causes of action that "Landgate must establish the invalidity of the Commission's action before seeking to recover on an inverse condemnation claim." (Some caps. omitted.)

Landgate's expenses in the mandate proceeding were not so incurred. The statutory language actually provides that the specified expenses are to be reimbursed if "actually incurred because of [any inverse condemnation proceeding.]" (Code Civ.Proc., § 1036, emphasis added.)

Since Landgate had to resolve the propriety of the permit denial before it could litigate whether that denial constituted a taking, entitling Landgate to just compensation, resolution of the mandate claim was part of the inverse condemnation proceeding and any statutory fees and costs incurred in resolving the mandate claim were "actually incurred because of" such proceeding.[13] (Code Civ. Proc., § 1036.)

13/ Because we hold that section 1036 requires reimbursement of attorney fees and costs incurred in the mandate litigation, we need not address the Commission's assertion, predicated on a contrary conclusion, that the trial court was required to apportion between the mandate and inverse condemnation proceeding expenses. We note, however, that none of the cases cited by the Commission addressed a situation where, as here, a landowner succeeded on a mandate claim for a taking by overregulation, a prerequisite to a later successful finding that a taking had occurred and an award of damages therefor. Instead, the cited cases required allocation of attorney fees or attorney fees and costs (1) where the litigation involved inverse and direct condemnation, on one hand, and nuisance-personal injury claims, on the other, in which the appellate court remanded because it could not tell which attorney fees had been awarded on which claims (*Greater Westchester Homeowners Assn. v. City of Los Angeles* (1979) 26 Cal.3d 86 [airplane overflights, landowners' lawsuits consolidated with City's direct condemnation suits and bifurcated into condemnation and nuisance trials]), (2) where a landowner's claims of nuisance, negligence and trespass for flooding was bifurcated into liability and damages segments (*Salton Bay Marina, Inc. v. Imperial Irrigation Dist.* (1985) 172 Cal.App.3d 914), (3) where the appellate court affirmed a judgment based on a jury's findings of liability and damages

(continued...)

The Commission's claim that the trial court did not abuse its discretion in denying the mandate expenses misses the mark. Section 1036 provides that a court "shall determine and award or allow" such sum as will, in its opinion reimburse the plaintiff. (Emphasis added.) The section thus requires an award (*Customer Co. v. City of Sacramento* (1995) 10 Cal.4th 368,390); the amount of the award is a matter of discretion. On remand, Landgate will have to establish the reasonableness of its fees and costs.

The Commission also asserts that Landgate's claim for fees and costs in the mandate proceeding is barred under the doctrines of res judicata and collateral estoppel. We agree that to the extent Landgate was awarded and paid non-section 1036 costs in the mandate proceeding, and did not challenge the reasonableness thereof by filing a cross-appeal in the mandate proceeding, that issue is resolved. However, in light of our holding that Landgate is entitled to section 1036 expenses for the mandate proceeding, on remand the trial court will review Landgate's substantiation of those expenses to determine, in its discretion, whether Landgate has sufficiently identified those expenses and whether the amounts claimed are reasonable, pursuant to the statute.

13/ (...continued)
in landowner's claims of inverse condemnation and nuisance for flooding and reversed and remanded only because the trial court improperly calculated the amount of prejudgment interest due on the damages award (*Imperial Cattle Co. v. Imperial Irrigation Dist.* (1985) 167 Cal.App.3d 263), or (4) where a city's direct condemnation and landowner's inverse lawsuits were consolidated and then bifurcated into liability and damages phases (*Los Angeles v. Waller* (1979) 90 Cal.App.3d 766 [appellate court addressed reasonableness of trial court's section 1036 award]).

We reject the Commission's implicit argument that Landgate is barred from claiming section 1036 expenses because it did not claim its entitlement to them on a cross-appeal from the mandate action. At that point, had Landgate made a section 1036 expenses claim to this court, we would have denied its request as premature, because Landgate had not yet shown a taking had occurred. Landgate has now established the taking element and is entitled to section 1036 expenses in such reasonable amount as the trial court may find.

IV

Title 42 United States Code Section 1983

Landgate claims the trial court erred by sustaining the Commission's demurrer to Landgate's cause of action for violation of civil rights under Title 42, United States Code, section 1983 (hereinafter section 1983), and compounded the error by granting the Commission's motion to quash service on individual commissioners and staff members after Landgate amended its section 1983 claim to name them as individual defendants.

In its seventh cause of action, Landgate claimed the Commission's 1991 permit denial violated section 1983. The claim was asserted against the Commission only. The trial court sustained the Commission's demurrer on the ground that the State and its agencies were not "persons" within the meaning of section 1983 (*Rossco Holdings Inc. v. State of California* (1989) 212 Cal.App.3d 642, 661). The section 1983 claim was dismissed February 24, 1991. The trial court's action was proper because the State and its agencies are not "persons" within the meaning of the federal civil rights act.

(*Will v. Michigan Dept. of State Police* (1989) 491 U.S. 58, 71; *Pyne v. Meese* (1985) 172 Cal.App.3d 392, 405.)

On February 14, 1992, Landgate sought to amend its complaint by naming individual Commission members and staff as Does 1 through 17.[14] On February 18, the trial court stayed trial court proceedings until appellate proceedings were concluded. On February 19, a Deputy Attorney General informed Landgate's counsel the Attorney General was not authorized to accept service for any individuals and that Landgate would have to serve individual defendants individually. The stay was lifted on April 23, 1993, and Landgate resumed efforts to serve the individuals. Counsel for the parties agreed that a motion to quash was the best way to resolve the propriety of Landgate's move. The Commission moved to quash on the ground that the claims against the individuals were time barred. On October 5, the trial court granted the motion.

We find no error in the trial court's grant of the Commission's motion to quash. The limitations period in California for asserting a claim under section 1983 is one year. (*City of Huntington Park v. Superior Court* (1995) 34 Cal.App.4th 1293, 1297; *Trimble v. City of Santa Rosa* (9th Cir. 1995) 49 F.3d 583, 585.) Landgate does not specify a date on which its section 1983 cause of action accrued. Contrary to its suggestion that the statute did not begin to run until "the state court render[ed] a final decision" on its permit application, the cause of action arises when the agency issues a final decision ripe for review. (*Norco Constr., Inc. v. King County* (9th Cir. 1986) 801 F.2d 1143, 1146.) Thus, Landgate's naming of individual defendants on February 14, 1992, occurred more than a year after the February 7, 1991,

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14/ This amended complaint does not appear in the record.

permit denial. Its section 1983-based cause of action was time barred.

We reject Landgate's assertion that its claims against individual commissioners and staff were not untimely because they originally had been named as Doe defendants and, as a result, the claims against them related back to the initial section 1983 claim.

"In order to relate an amended complaint back to the original complaint to avoid the statute of limitations, the plaintiff must be genuinely ignorant of the defendant's identity or the facts rendering the defendant liable when the original complaint was filed. [Citations.] When it appears that plaintiff knew both the person's identity and the facts giving rise to liability when the complaint was filed, but did not name him, that person cannot be served as a Doe after the statute of limitations has run. [Citation.]" (*Taito v. Owens Corning* (1992) 7 Cal.App.4th 798, 802.)

There was more than sufficient evidence for the trial court to conclude that Bogart and Petrovsky knew the identity of each staff person and commissioner involved in the decision when Landgate filed its March 26, 1991, petition/complaint. The transcript of Commission proceedings on February 7, 1991, and other Commission documents were attached to the petition/complaint, which itself reflects Landgate knew the identities of the individuals involved in the denial when the denial occurred. Not only had Petrovsky dealt with staff before the hearing, but the transcript identifies commissioners and staff members involved in the denial. The transcript also reflects that Bogart and Petrovsky attended the February 7, 1991, meeting. The trial court properly granted the Commission's motion to quash.

DISPOSITION

We reverse (1) the award of property taxes and (2) the denial of Landgate's request under section 1036 for costs and fees incurred in the writ of mandate proceeding. The matter is remanded for the trial court's determination of Landgate's section 1036 expenses, including Landgate's appellate defense of the trial court's grant of the petition for writ of mandate. In all other respects, the judgment is affirmed. Landgate is awarded its costs on this appeal.

CERTIFIED FOR PARTIAL PUBLICATION

ORTEGA, Acting P.J.

We concur:

VOGEL (Miriam A.), J.

MASTERSON, J.

2418453.01

APPENDIX C

NOT TO BE PUBLISHED

**IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION ONE**

FILED Dec 18 1992

LANDGATE, INC., et al.,	)	
	)	
Plaintiff and	)	
Respondent,	)	No. B063485
	)	
v.	)	Super. Ct. No.
	)	BC 024391
CALIFORNIA COASTAL	)	
COMMISSION,	)	
	)	
Defendant	)	
and Appellant.	)	
	)	

APPEAL from an order of the Superior Court of Los Angeles County. Emilie Elias, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Daniel E. Lungren, Attorney General, Roderick E. Walston, Chief Assistant Attorney General, Jan S. Stevens, Assistant Attorney General and Peter H. Kaufman, Deputy Attorneys General, for Defendant and Appellant.

Reznik & Reznik, Benjamin M. Reznik, Fred N. Gaines, and John M. Bowman for Plaintiff and Respondent.

INTRODUCTION

Respondent/defendant California Coastal Commission (hereinafter Commission) appeals from the trial court's order issuing a writ of mandate vacating the Commission's disapproval of a lot reconfiguration and proposed home building project on an unimproved Malibu lot owned by petitioner/plaintiff Landgate, Inc. We affirm the order issuing the writ.[1]

FACTS

Sometime before 1973, a large unimproved Malibu tract which included what is now Landgate's lot and the adjoining parcel was approved for subdivision into approximately two-acre lots, each zoned for a single-family home. After the subdivision, Landgate's predecessor owned both lots, running

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1/ The order issuing the writ is appealable. (Code Civ. Proc. §§ 1094.5, subd. (g); 1110.) Without objection, the trial court severed consideration of the writ petition from Landgate's causes of action seeking declaratory relief and compensatory damages for unjust taking and civil rights violations. Landgate's remaining causes of action remain pending in the trial court and are not before us.

north and south and containing sloped northern and flat southern sections. One lot contained a single family home on its flat southern portion. Both lots are within the coastal zone in which development is subject to Coastal Act regulation by the Commission.

In the mid-1980's, the County of Los Angeles planned to improve an east-west road through the two parcels. The proposed road divided the lots into sloped northern and flat southern portions. Landgate's predecessor and the county agreed that, in exchange for the owner's dedicating portions of the parcels for the roadway easement, the county would reconfigure the lots into a single sloped lot north of the road and a single flat lot, containing the existing home, south of the road. Each lot remained zoned for one single family home. The county completed the road project and formally approved the lot reconfiguration, which was recorded on July 5, 1989. "The COMMISSION was aware of and approved the contemplated improvement of [the road]." The Commission earlier approved the county's Malibu land use plan (LUP) but at all relevant times had not yet certified a county Malibu local coastal program (LCP.) The previous owner did not seek or receive Commission approval of the lot reconfiguration. The Commission did not challenge the county's reconfiguration approval.

In October 1990, Landgate bought the sloped northern lot and applied for and received county approval for a single family home on the lot. Mr. and Mrs. Peter Bogart own a life estate in Landgate's lot. Landgate then applied to the Commission for approval. The lot overlooks a canyon, portions of which are being converted into a park. Landgate originally proposed a 9,036 square foot home requiring 8,500 cubic yards of fill. Landgate later modified its proposal,

reducing the home to 7,500 square feet requiring 4,300 cubic yards of fill.

The Commission considered Landgate's modified proposal at its December 13, 1990, hearing. On that date, the Commission's staff first questioned whether Landgate's lot was legal under the Coastal Act. The Commission continued the hearing to study that question. On February 7, 1991, the Commission denied Landgate's application, finding that Landgate's lot constituted impermissible "development" under the Coastal Act because it was created without Commission approval, and the proposal would produce excessive soil, grading, and visual degradation. Later, the Commission denied Landgate's reconsideration request which included a newly modified proposal reducing grading to approximately 500 cubic yards, eliminating visible retaining walls, and reducing the building's height, designed to meet Coastal Act requirements. During this process, the Commission approved two other proposed homes on nearby lots in the sloped area north of the road.

Landgate then sued and, among other relief, petitioned for a writ of mandate. Landgate claimed the Commission used the lot reconfiguration disapproval as leverage to force greater concessions on the project, with a ban an any construction as the ultimate threat. On October 24, 1991, the trial court issued the writ, vacating the Commission's denial of the project and ordering it to reconsider the application assuming the lot reconfiguration valid.

The Commission scheduled the matter for its November 14, 1991, San Diego meeting. Although Landgate prepared for and traveled to the meeting, the Commission continued the matter until its December meeting without conducting a hearing. On November 21, 1991, the Commission filed a

return stating the parties were exploring a settlement involving approval of a smaller project on Landgate's lot. Landgate claimed that, during the continuing negotiations, the Commission told Landgate that, unless Landgate agreed in advance to waive its damage and attorney's fees claims, the Commission likely would appeal the order and conduct no hearing. Landgate refused. At its December 10, 1991, meeting, the Commission announced it would appeal the order and conducted no hearing.

ISSUE

The Commission contends, and Landgate disputes, that the Coastal Act gave it jurisdiction over the lot reconfiguration despite its approval of the county's LUP and failure to challenge the county's approval of the lot reconfiguration.[2]

DISCUSSION

Two aspects of "development" are involved here. First, Landgate's proposed project requires building new structures. Second, the lot reconfiguration may constitute "development" if it permits building where it otherwise would not occur. The parties correctly agree that the Coastal Act empowers the

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2/ Because we reject the Commission's contention and affirm the order, we need not address Landgate's alternative arguments supporting the order that the Commission is estopped from disapproving the lot reconfiguration and that it abused its discretion in denying Landgate's application. Moreover, because the issue is not before us and the City of Malibu is not a party, we decline Landgate's request to retroactively exempt the project from Malibu's building moratorium. We deny Landgate's sanctions request.

Commission to control "development" in the coastal zone, and that Landgate's proposed project, i.e., the home and its related grading, retaining walls, etc., is "development" subject to such control.

Regarding the second type of development, the Commission concedes that the lot reconfiguration caused no increase in the number of lots or homes, but argues it had a negative qualitative impact on the coastal zone by permitting building where it otherwise would not have occurred. Thus, the Commission concludes, it properly could reject the reconfiguration as new "development" inconsistent with the Act.

On this record, we disagree. The Commission's argument contains three serious false assumptions: 1) Landgate chose to build on the sloped northern, with negative environmental impact, rather than flat southern, without negative environmental impact, side of the road; 2) Landgate, not the Commission, is responsible for and should bear the consequences of the lot reconfiguration; and 3) any development on Landgate's lot is inconsistent with the Coastal Act.

First, Landgate was not involved in the decisions to build the road and reconfigure the lots. Landgate purchased a properly recorded single sloped lot north of the road which was zoned for a single-family home. Landgate cannot build south of the road, in an environmentally less sensitive area, because it owns no property south of the road.

Second, after the subdivision, Landgate's predecessor owned two valid, properly recorded lots, each zoned for, and one already containing, a single-family home. The Commission essentially concedes it would approve in principle construction

on the flat area south of the road. However, the Commission approved both the county's Malibu LUP and the road. It was the road, not any decision by Landgate, that rendered the existing lot configuration impractical and created the potential for "development" on what is now Landgate's lot. The previous owner might not have granted the road easements if the result was two lots, each split by the road. Rejecting the lot reconfiguration results in Landgate's being denied any use of its property. The reconfigured lot resulted from action approved by the Commission in which Landgate played no part.

Moreover, we find unpersuasive the Commission's related point that, although its action leaves Landgate with a useless lot, Landgate has not been treated unfairly because it may pursue remedies against the previous owner. Absent the unlikely scenario that the previous owner expressly told Landgate that the Commission expressly approved the lot reconfiguration, we think the Commission's suggested "remedy" for its essentially depriving Landgate of its property without compensation illusory. While the parties presumably knew that the Commission would regulate and had to approve any proposed building on the reconfigured lot, they would not reasonably have assumed that express Commission approval was required for the reconfiguration itself where, as here, it was approved and recorded by the county as part of the road development and LUP approved by the Commission.

Third, the Commission assumes that any building on Landgate's lot is inconsistent with the Coastal Act. The Act is designed to "[p]rotect, maintain, and, where feasible, enhance and restore the overall quality of the coastal zone environment and its natural and artificial resources" (Pub. Res. Code, § 30001.5, subd. (a)), while recognizing that "future developments that are carefully planned and developed

consistent with the policies of this division, are essential to the economic and social well-being of the people of this state and especially to working persons employed within the coastal zone." (Pub. Res. Code, § 30001, subd. (d).) The Act is designed to assure protection of the zone's scenic and visual qualities, minimize natural landform alteration, and avoid erosion and degradation of parks and recreation areas. (Pub. Res. Code, §§ 30251, 30253, subd. (2), 30240, subd. (b).) However, the Act "is not intended, and shall not be construed as authorizing . . . the commission . . . to exercise [its] power to grant or deny a permit in a manner which will take or damage private property for public use, without the payment of just compensation therefor," and "is not intended to increase or decrease the rights of any owner of property under the Constitution of . . . California of the United States." (Pub. Res. Code, § 30010.) However, the Commission negotiated with Landgate before and after it questioned the lot's legality. Thus, the Commission contemplated some building on the lot. Moreover, the Commission approved proposed homes on nearby lots in the sloped area. While we recognize that each lot has unique topography and impact on surrounding areas, the Commission's approval of two nearby projects in the sloped area rebuts its claim that building on Landgate's lot would appreciably degrade the area. In fact, this record demonstrates that the Commission used the "illegal lot reconfiguration" issue as leverage to extract greater concessions from Landgate.

We stress that the Commission retains its ability to regulate and approve any proposed building on the lot. Moreover, we limit our analysis to the peculiar facts before us. We do not address whether under other circumstances the Commission properly could reject a lot reconfiguration. On this record, the trial court properly issued the writ.

DISPOSITION

We affirm the judgment (order issuing writ of mandate). Landgate is entitled to its costs on appeal.

NOT TO BE PUBLISHED.

ORTEGA, J.

We concur:

SPENCER, P. J.

ARANDA, J.*

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* Assigned by the Chairperson of the Judicial Council.

APPENDIX D

SUPERIOR COURT
OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

ORIGINAL FILED
AUG - 9 1993
LOS ANGELES
SUPERIOR COURT

LANDGATE, INC.,	)	No. BC 024 391
	)	
Petitioner and	)	**ORDER GRANTING**
Plaintiff,	)	**SUMMARY**
	)	**AJUDICATION OF**
vs.	)	**ISSUES IN FAVOR OF**
	)	**PLAINTIFF**
CALIFORNIA COASTAL	)	**LANDGATE, INC.**
COMMISSION; and	)	
DOES 1 through 100,	)	DATE: June 14, 1993
inclusive,	)	TIME: 8:30 a.m.
	)	PLACE: Department 20
Respondents and	)	
Defendants.	)	MOT. C/O: June 30, 1993
	)	DIS. C/O: Not Yet Set
	)	
	)	TRIAL DATE: Not Yet Set
	)	

Plaintiff Landgate, Inc.'s ("Landgate") motion for summary adjudication of issues came on regularly for hearing on June 14, 1993 in Department 20 of the above-referenced court, the Honorable Richard C. Hubbell, Judge presiding. Fred N. Gaines of Reznik & Reznik appeared on behalf of the moving party Landgate. Peter H. Kaufman, Supervising Deputy Attorney General, appeared on behalf of defendant California Coastal Commission ("Commission").

After full consideration of the evidence, the separate statements submitted by each party, and the authorities submitted by counsel, as well as oral argument by counsel, the court finds that no triable issue of material fact exists as to the issue of liability raised in the third cause of action of Landgate's Verified Petition for Writ of Mandate and complaint for taking of private property without just compensation, and that summary adjudication should be granted with regard to the following issue:

ISSUE ONE: Landgate's third cause of action for taking of property without just compensation in violation of the 5th and 14th Amendments to the United States Constitution and Article I, Section 19 of the California Constitution is meritorious as a matter of law and there is no defense thereto because Landgate has been deprived, at least temporarily, of all economically viable or productive use of its property insofar as Landgate, at least temporarily, could not legally obtain any valid permits or approvals to construct any project on its property as a result of the Commission's actions.

In accordance with Code of Civil Procedure section 437c, the court ruled that such a taking has occurred as demonstrated by the factual material (Separate Statement

of Undisputed Facts, Undisputed Material Fact Nos. 1-17 and Supporting Evidence in Support Thereof), case law and statutes cited.

The court denied Landgate's motion for summary adjudication of issues as to Issue No. 2 and Issue No. 3 stated therein, finding such issues to be moot as a result of the ruling set forth above.

The final judgment in this action, in addition to any other matters determined at trial, shall award judgment in accordance with the matters so adjudicated in this order.

IT IS SO ORDERED.

DATED: August -9 1993

/s/ RICHARD C. HUBBELL
JUDGE OF THE SUPERIOR COURT

2418446.01

APPENDIX E

SUPERIOR COURT
FOR THE STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

FILED
OCT 16 1991
JAMES H. DEMPSEY
CLERK

LANDGATE, INC.,	)	CASE NO. BC 024 391
	)	
Petitioner and Plaintiff,	)	**PARTIAL JUDGMENT GRANTING PEREMPTORY WRIT OF MANDATE**
	)	
-vs-	)	
	)	
CALIFORNIA COASTAL COMMISSION; and DOES 1 through 100, inclusive,	)	
	)	
Respondents and Defendants.	)	
	)	
	)	

The Court having granted Petitioner's Motion to Sever the First Cause of Action for early trial, the First Cause of Action for Writ of Mandate in the above-entitled matter came on for trial on October 4, 1991 in Department 85 of this Court, the Honorable Emilie Elias, Commissioner, presiding by stipulation and without a jury. Fred N. Gaines, Esq. and Benjamin M. Reznik, Esq. of Reznik & Reznik appeared on behalf of Petitioner and Plaintiff, LANDGATE, INC. Alan V. Hager, Deputy Attorney General, appeared on behalf of Respondent and Defendant, the CALIFORNIA COASTAL COMMISSION. The Administrative Record having been received into evidence without objection, and the matter having been briefed, argued and submitted for decision, it is ORDERED, ADJUDGED AND DECREED:

1. A Peremptory Writ of Mandate shall issue from this Court commanding Respondent, the CALIFORNIA COASTAL COMMISSION ("COMMISSION"), to set aside its action of February 7, 1991 denying Petitioner's application for a Coastal Development Permit (Application No. 5-90-921), and ordering that the COMMISSION reconsider such application at its next meeting for which proper notice can be given and take action in all due speed on such application consistent with this judgment.

2. The Court finds that based on the factual circumstances in this case, the definition of "development" as found in Public Resources Code §30106 does not include the lot line adjustment approved and recorded by the County of Los Angeles in 1989 with regard to the subject property. Therefore, upon remand to the COMMISSION, the COMMISSION must consider Petitioner's application without any reference or consideration of the lot line adjustment. The

COMMISSION is to consider the subject property to be a legal lot.

3. The Court will retain continuing jurisdiction over this matter for all purposes.

DATED: October 16, 1991

/s/ Emilie Elias
THE HONORABLE EMILIE ELIAS
SUPERIOR COURT COMMISSIONER

Approved as to Form:

/s/ Alan V. Hager
ALAN V. HAGER
Deputy Attorney General
For Respondent
CALIFORNIA COASTAL COMMISSION

2418431.01